NO. 82-5335

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

KERMIT SMITH, JR.

Petitioner,

- against -

STATE OF NORTH CAROLINA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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ATTORNEY OF RECORD

QUESTION PRESENTED

Whether the North Carolina Supreme Court misinterpreted Furman v. Georgia, 408 U.S. 238 (1972), in construing its death penalty statute to require - instead of permit - a capital verdict if the jury made three separate fact findings regarding aggravating circumstances when the sole ground for the holding was the Court's belief that its construction of the statute was compelled by this Court's decisions condemning unbridled jury discretion?

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Petitioner, Kermit Smith, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at ____ N.C. ____, 292 S.E.2d 264 (1982), and is attached as Appendix A.

JURISDICTION

The opinion of the Supreme Court of North Carolina was issued on June 2, 1982. The judgment of the Supreme Court of North Carolina was issued on June 22, 1982, and is attached hereto as Appendix B. On July 23, 1982, Justice Brennan extended the time for filing this petition to and including August 31, 1982. This Court's jurisdiction is invoked pursuant to 28

U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted:"

and the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

> "(N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the North Carolina death penalty statute, N.C. Gen. Stat. §15A-2000 et seq., which is attached as Appendix C.

STATEMENT OF THE CASE

Petitioner Kermit Smith, Jr. was convicted and sentenced to death by a Halifax County, North Carolina jury on April 30, 1981, for the first-degree murder of Whelette Collins.

Petitioner was arrested and charged with the murder of Whelette Collins on December 4, 1980, and a bill of indictment was returned by the Grand Jury on December 8, 1980. Petitioner was judicially determined to be indigent and counsel was appointed to represent him.

On April 27, 1981, petitioner was tried in Halifax County, North Carolina on the charge of murder (and upon charges of armed robbery and rape). Petitioner pleaded not guilty to all

charges. At trial, the State presented evidence that on December 4, 1980, petitioner robbed and kidnapped Whelette Collins (and two companions) in Rocky Mount, North Carolina, took her to Halifax County, North Carolina, and thereafter raped and killed her. The evidence further showed that the victim's two companions escaped and then led law-enforcement officers to the scene where petitioner was arrested.

The petitioner offered no evidence at the guilt stage, and the jury convicted him of first degree murder (and of second degree rape and common law robbery). (Petitioner was sentenced to forty years on the rape conviction, and to ten years on the common law robbery conviction.)

Immediately following the guilt stage, a sentence hearing was held pursuant to N.C. G.S. 15A-2000, before the same jury that had determined guilt. The State offered no further evidence. Petitioner offered evidence, through both expert and lay witnesses, of mitigating circumstances. Two psychiatrists testified that petitioner was under the influence of an emotional disturbance and that his capacity to conform his conduct to the requirements of law was impaired. One psychiatrist testified that petitioner's ability to appreciate the criminality of his conduct was impaired.

The jury was instructed to and did answer four issues as follows:

<u>ISSUE NO. ONE</u>:

> Do you unanimously find from the evidence beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?
> ANSWER: Yes.

1. Was the murder committed while the defendant was engaged in the commission of or attempt to commit rape of the deceased?
ANSWER: Yes.

2. Was the murder committed while the defendant was engaged in the commission of or attempt to commit robbery of the deceased?
ANSWER: Yes.

3. Was the murder committed while the defendant was engaged in the commission of or attempt to commit kidnapping of the deceased?
ANSWER: Yes.

4. Was the murder especially heinous, atrocious or cruel?
ANSWER: Yes.

ISSUE NO. TWO:

Do you find that one or more of the following mitigating circumstances exist?

1. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
ANSWER: Yes.

2. At the time of the murder, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
ANSWER: No.

3. The age of the defendant at the time of the crime.
ANSWER: No.

4. That the defendant has no significant history of prior criminal activity.
ANSWER: No.

5. Are there any other circumstances arising from the evidence which you, the jury, deem to have mitigating value?
ANSWER: No.

ISSUE NO. THREE:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?
ANSWER: Yes.

ISSUE NO. FOUR:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?
ANSWER: Yes.

The jury was also instructed to make its sentence recommendation by writing in "Life imprisonment" or "Death" in the blank space on their recommendation as follows:

> We, the jury, based upon the answer to the above issues, and as evidenced by the signature of the undersigned Foreman, unanimously recommend to the Court that the punishment for the defendant, Kermit Smith, Jr., be ____________________.

(The jury eventually wrote "Death" in the blank space.)

During the jury deliberations, the following occurred:

THE COURT: Ladies and gentlemen, I understand from the Deputy Sheriff that there is some question the jury wishes to ask me, is that correct?

FOREMAN: Yes, your Honor. Before I ask the question, I don't think that anybody should jump to conclusions --

THE COURT: All right.

FOREMAN: -- on this because it could be misleading.

THE COURT: All right.

FOREMAN: Should the aggravating circumstances outweigh the mitigating circumstances --

THE COURT: Are you reading from one of the issues?

FOREMAN: I sure am not.

THE COURT: All right. Okay.

FOREMAN: I didn't mean to answer you that way.

THE COURT: All right.

FOREMAN: Should the aggravating circumstances outweigh the mitigating circumstances and should the jury have unanimously agreed, does this mean the jury is required to impose the death penalty or could a life sentence be imposed?

THE COURT: You are referring to Issue No. Three, are you not? Will you look there so I can be sure we are talking about the same thing?

FOREMAN: Well, we have --

THE COURT: Well, just look at Issue No. Three and let me -- maybe I can answer you.

FOREMAN: Okay. Very well.

THE COURT: (All right. Now, if you've answered that, Yes, you would go to Issue No. Four. That reads: Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty? Now, that is for the jury to determine as to whether those aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty. If you find that they are not sufficiently substantial to call for the death penalty, you would answer that, No; or to put it more accurately, if you fail to find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty, if you fail to do that, you would answer it, No. Now, if you answer that, No, you would have to recommend life imprisonment. But if you answer it, Yes, it would be your duty to recommend the death penalty.)

EXCEPTION NO. 14.

Does that answer your question?

(No response.)

THE COURT: You say you have already answered the third issue --

FOREMAN: That's correct.

THE COURT: If you've answered the Third Issue, No. You wouldn't even need to consider the Fourth Issue. If you have recommended life imprisonment. (But if you've answered the Third Issue, Yes, then, depending upon how you answered the Fourth Issue would determine your answer to what your recommendation is.)

EXCEPTION NO. 15.

Is that clear to you? If it isn't, feel free to tell me.

FOREMAN: I think so, yes. There is one other question, and --

THE COURT: (Just let me say this: Of course, I am not suggesting what your answers should be or what your recommendation should be except that if you fail to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, then you would recommend life imprisonment. Or, if you fail to find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty, then you would recommend life imprisonment. But if you find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances, and on Issue Four if you should find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty, then it would be your duty to recommend death.)

EXCEPTION NO. 17.

Now, is there something else you want to ask me?

FOREMAN: Yes, sir.

THE COURT: All right.

FOREMAN: The jury -- we heard summations of a life sentence that the defendant would never get out again. That was by one of the attorneys, and we would like to know what is --

THE COURT: That should not enter into your consideration at all.

FOREMAN: Thank you, your Honor.

THE COURT: All right.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

After the jury had been instructed by the trial judge and had deliberated on its answers to the four issues, the jury returned to the courtroom and asked the trial judge whether, if the jury had found the aggravating circumstances outweighed the mitigating, was the jury ". . . required to impose the death penalty, or would a life sentence be imposed?" Rp 98. The Court replied that if the jury answered Issues Nos. Three and Four in the affirmative, ". . . it would be your duty to recommend death." Rp 98-99.

Defense counsel was not required to make an objection at trial to an error in jury instructions. N.C. G.S. 15A-1446(d)(13) provided that errors based upon an error of law in the charge to the jury may be the subject of appellate review even though no objection, exception or motion was made in the trial division.

Petitioner's counsel did note an exception, Rpp 98-99, and assigned error, Rp 110, in the Record on Appeal. Petitioner contended on appeal in the North Carolina Supreme Court that the trial court's instructions were error, Defendant Appellant's Brief, pp 11-17.

The Attorney-General of North Carolina argued that "The procedure is an unconstitutional retreat to the past which ignores the dictates of current United States Supreme Court opinions". Brief for the State, p 60.

The North Carolina Supreme Court rejected the petitioner's argument and upheld the instructions of the trial court, with a dissent by Justice Exum. (On the same date that the opinion was issued in petitioner's case, the North Carolina Supreme Court also decided the same question in State v. Pinch, ____ N.C. ____, 292 S.E.2d 203(1982). The dissent of Justice Exum in petitioner's case was based upon his dissent in Pinch. 292 S.E.2d at 277.) A copy of the North Carolina Supreme Court's opinion in Pinch is attached hereto as Appendix D.

Justice Exum pointed out in his dissent that:

> The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, have made it abundantly clear that the majority's interpretation is not constitutionally required. Ibid.

REASON FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS MISAPPREHENDED THE MEANING OF FURMAN V. GEORGIA, 408 U.S. 238, BY HOLDING THAT A CONSTRUCTION OF ITS DEATH PENALTY STATUTE WHICH WOULD PERMIT A JURY TO RENDER A LIFE VERDICT IF IT MADE THREE SEPARATE FINDINGS REGARDING AGGRAVATING CIRCUMSTANCES WOULD CONSTITUTE UNCONSTITUTIONAL UNBRIDLED DISCRETION

The majority of the Court below construed North Carolina's post-Woodson[1] death penalty statute, N.C. Gen. Stat. §15A-2000 et. seq. (1977), Appendix C, infra, to require, instead of permit, a verdict of death upon certain specific jury findings. 292 S.E.2d at 276, citing State v. Pinch, ____ N.C. ____, 292 S.E.2d 203 (1982), filed the same date.

There were four sentencing issues submitted to the jury. Twice the Court instructed the jury that "it should proceed to issue four only after answering issues one and three affirmatively and, then if it also answered the final issue affirmatively, that it would have the duty to return a verdict of death against the defendant." (Emphasis in original) 292 S.E.2d at 275. Petitioner argued in the Court below that the "trial court thereby erroneously impeded a 'truly individualized assessment of the propriety of the death penalty' by the jury in contravention of the provisions of G. S. 15A-2000".[2] 292 S.E.2d at 275.

The North Carolina Supreme Court rejected petitioner's argument indicating that "it had upheld an identical instruction in State v. Pinch (supra) also decided this date." 292 S.E.2d at 275. In Pinch, the North Carolina Supreme Court held that "the trial court had correctly advised the jury 'that it had a

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1 Woodson v. North Carolina, 428 U.S. 280 (1976).

duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G. S. 15A-2000(c)'."[3] 292 S.E.2d at 275. The holding in Pinch, Smith and State v. Williams, 292 S.E.2d 243 (1982), also decided on the same date on an identical issue, was based upon the North Carolina Supreme Court's belief that to hold otherwise would permit a jury "to exercise unbridled discretion . . ." 292 S.E.2d at 227, prohibited by Furman v. Georgia, 408 U.S. 238 (1972).

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2 The relevant portions of the statute are:

(b) Sentence recommendation by the Jury.---Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

Justice Exum, dissenting in Pinch on this point, put the issue clearly:

> I find myself, first, in strong disagreement with the majority of an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones analysis, that under the statute, G. S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury must return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, (4) have made it abundantly clear

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Footnote 2 continued:

(c) Findings in Support of Sentence of Death.--- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N. C. Gen. Stat. §15A-2000(b) and (c).

3 15A-2000(c)(1)(2) & (3), note 3, supra.

4 The statement that none of this Court's decisions are "mentioned in the majority's decision" may be somewhat misleading. The majority had said that "defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). . ." and then quoted from Goodman including the following:

> The exercise of such unbridled discretion by the jury under the court's instructions would be contrary to the rules of Furman and the cases which have followed it. Id. at 35, 257 S.E.2d at 590.

292 S.E.2d at 227. Thus, the court's holding in this case was specifically grounded -- albeit within a quote -- upon its interpretation of this Court's Eighth Amendment decisions.

> that the majority's interpretation is not constitutionally required. (Emphasis in original).

292 S.E.2d at 230. Justice Exum, finding no barrier in this Court's death penalty decisions to the construction of the statute urged by petitioner, proceeded "'to ascertain the intent of the legislature,'" 292 S.E.2d at 230, and concluded that the jury members should be "told that if they answer the crucial issues affirmatively and unanimously, 'you may, although you need not, recommend that the defendant be sentenced to death,'" 292 S.E.2d at 236, an instruction which had been "recommended by the Superior Court Judges Pattern Jury Instruction Committee in May 1979," ibid, but which was replaced in May 1980 after State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), by the language used by the judge at petitioner's trial.

Since the North Carolina court has interpreted its statute "as it did because it felt under compulsion of federal law as enunciated by this court . . .," Missouri v. Mayfield, 340 U.S. 1, 5 (1950), a federal question is presented for review. Ibid. State courts are, of course, free to interpret their statutes "solely as a matter of local law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, ___ (1977). However, when a "reading of a whole opinion shows (that the state court ruled) not as a matter of statutory construction, but because it thought the Federal Constitution required such action," Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924), then a federal question is presented for review by this Court. State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939). Moreover, a federal question is also presented if the State court decision rests upon both state and federal law but "these two grounds

are so interwoven that (this Court is) unable to conclude that the judgment rests upon an independent interpretation of the State law." Ibid. Furthermore, a federal question remains when "doubt exists as to whether the State court "did not deem itself bound" by the federal considerations, Missouri v. Mayfield, supra, or where the decision "might have been decided differently if the court below had felt free, under (this Court's) decisions, to do so." Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 433 (1951); United Air Lines v. Mahin, 410 U.S. 623, 633 (19__). See, also Delaware v. Prouse, 440 U.S. 648, 653 (19__).

There is no doubt here that the North Carolina adopted a construction of its statute as it did because it "deem(ed) itself bound," Missouri v. Mayfield, 340 U.S. at 4, by "'the rules of Furman (v. Georgia, 408 U.S. 238) and the cases which have followed it.'" 292 S.E.2d at 227.

It was expected by the litigants below that this "extremely important new question dealing with the construction of our death penalty statute," 292 S.E.2d at 230 (Exum, J. dissenting), would be controlled by the court's interpretation of Furman. The issue originated from language in the court's decision in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). There the jury had been instructed that if it answered the three statutorily required "issues affirmatively and unanimously, it 'may then recommend the death penalty.' (R. at 185)." 292 S.E.2d at 233 (Exum, J. dissenting). (Emphasis in original). It had not been instructed, as was petitioner's jury, that after making those findings it was then duty bound to recommend death. Goodman argued on appeal that there should have been further instructions that the jury, "'had the option of returning a

recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances.' Brief for Defendant Appellant at 15-16." Ibid. The court rejected that argument specifically relying upon its understanding of Furman. The Court held that to adopt Goodman's proposed instructions,

> would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.

298 N.C. at 35, 257 S.E.2d at 590.

As noted above, prior to Goodman, the North Carolina Pattern Jury Instructions promulgated by a committee of the Conference of Superior Court Judges had advised trial judges to instruct the jury that it "'may although it need not, recommend that the defendant be sentenced to death,'" 292 S.E.2d at 232 (Exum, J. dissenting), upon making the statutory findings. Such instructions "or a variation of them" were given "in a large number of death penalty cases."[5] In some cases, where jurors were so instructed, defendants received life sentences notwithstanding affirmative answers to the three issues. Id. at 234 n. 4.

In reliance upon Goodman, the Pattern Instructions were changed in May 1980 to impose a "duty to recommend that the defendant be sentenced to death," id. at 233, if the necessary findings were made in favor of the State.

In the North Carolina Supreme Court, petitioner Pinch not only advanced arguments in support of his contention that the General Assembly had intended that jurors be permitted to

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5 Many such cases are listed at 292 S.E.2d at 232 n.3 (Exum, J. dissenting).

recommend life imprisonment notwithstanding findings of aggravating circumstances sufficient to call for the imposition of the death penalty which outweighed mitigating circumstances; he also sought to respond to the concerns expressed by the court in Goodman that such a construction might run afoul of the prohibitions against unbridled jury discretion.

The State, in its brief, chose to ignore all of petitioner Pinch's traditional arguments regarding legislative intent. The court had previously canvassed the legal and legislature history of the 1976 enactment and concluded that the General Assembly had, even more than the legislators of Georgia and Florida, borrowed extensively from the Model Penal Code (MPC). State v. Johnson, 298 N.C. 47, ____ - ____, 257 S.E.2d 597, 606-610 (1979).

> The North Carolina statute follows both in broad outline and in detail the MPC even more closely than did the statutes of Georgia and Florida. This is appropriate inasmuch as the concerns to which the MPC was addressed were the same as those considered controlling in the leading opinions of the United States Supreme Court in the cases discussed above.

257 S.E.2d at 610. Petitioner Pinch, therefore, argued that since under the models for the North Carolina statute, which had been approved by this Court, juries are free to recommend life regardless of any subsidiary findings, see Profitt v. Florida, 428 U.S. 242, 248; Gregg v. Georgia, 428 U.S. 153, 165-6, 207; MPC, Section 210.6(2), such a construction of the North Carolina statute was intended by the General Assembly. The State's brief had no answer to these arguments.

The total thrust of the State's brief in Pinch was that petitioner's construction would be unconstitutional. Brief for the State, pp. 67-72. "If the jury were allowed to make the

further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman simply does not allow" Id. at 72.

The State prevailed below on exactly the ground it had advanced. The majority relying on its reasoning in Pinch, 292 S.E.2d at 227, held that petitioner's construction would result in "unbridled" jury discretion allowing the jury "arbitrarily or capriciously (to) impose or reject a sentence of death," (emphasis in original), the Court determined that:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G. S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account accused."

292 S.E.2d at 275. The court further asserted that "We believe that the reasoning applies with even greater force in the instant (Smith) case since Judge Fountain carefully explained to the jury that it should exercise its full and considered discretion in deciding issue four. (Emphasis in original) 292 S.E.2d at 275. As to issue four, the trial judge instructed:

> That is for you to determine depending upon how you find from the case, from the issues you've answered. It is not something you would answer according to whim or caprice or guesswork, but you would weigh all the circumstances that you have found, if any, to be aggravating, those that you've found to be mitigating, and determine whether you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial; that is, sufficiently important to call for the imposition of the death penalty. If the State has satisfied you from the evidence and beyond a reasonable doubt that the

> aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty, you would answer that, Yes; otherwise, you would answer it, No. Record at 96-97.

292 S.E.2d at 275. The court indicated that "(i)t was only after this clear direction, which comports with the procedure contemplated by 15A-2000(b), (Appendix D), that Judge Fountain further told the jury that it had a duty to recommend capital punishment upon its affirmative answer to issue four". 292 S.E.2d at 275 and 276 (emphasis added).

The Court below concluded by holding that "Pinch, supra, constitutes sound and binding authority and is indistinguishable from the case at hand". 292 S.E.2d at 276. Petitioner's assignment of error was thereby overruled.

A reading of the "opinion as a whole," State Tax Commission v. Van Cott, supra, shows that the "majority construe(d) the statute in this way on the sole ground that otherwise the statute would be subject to constitutional attack that a jury could decide between life and death in its unbridled discretion." 292 S.E.2d at 277 (Exum, J. dissenting and citing Part I of (his) dissent in State v. Pinch, supra). At the very least, "(g)iving the opinion of the Supreme Court of (North Carolina) a scope most favorable to reliance on a non-federal ground, doubt still remains whether that court did not deem itself bound (to rule as it did) by its view of the demands of (this Court's) decisions . . ." Missouri v. Mayfield, supra. Accordingly, an important federal question emerges. Moreover, "(t)he possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." United Air Lines v. Mahin, 410 U.S. 623, 630-1 (1973).

The federal question presented is a critical one for which State courts and legislatures "deserve the clearest guidance that the court can provide." Lockett v. Ohio, 438 U.S. 586, 602 (1978). Petitioner had thought that it was clear that the extent of jury discretion which would remain if the North Carolina statute were construed as he contended the legislature intended would not be "capricious" in a constitutional sense under Furman, but instead would be "guided" as required by Gregg. That seemed to him to be holding of Gregg. See, 428 U.S. at 199, 203 (prevailing Opinion); id. at 199 (Opinion of White, J. joined by the Chief Justice and Rehnquist, J.). ("The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the bases of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail.") Whatever the holding of Gregg, the division of the court below demonstrates that "confusion," Lockett, 438 U.S. at 599, persists as to what satisfies both Eighth Amendment procedural commands and "goals of measured consistent application and fairness to the accused." Eddings v. Oklahoma, ____ U.S. ____, 71 L.Ed.2d 1, 8 (1982).

If the majority is correct, then this Court should so declare since, as pointed out by Justice Exum in his dissent in Pinch, Smith and Williams, statutes previously before this Court from other States would almost certainly be unconstitutional under Furman, 292 S.E.2d at 234-36. If, on the other hand, Justice Exum's conclusion in Pinch that "the majority's interpretation is not constitutionally required," 292 S.E.2d at 230, then this Court "should so declare, leaving the State court

free to decide the . . . issue solely as a matter of (North Carolina) law." Zacchini v. Screpps-Howard Broadcasting Co., 433 U.S. 562, ___ (1977); see, also, Delaware v. Prouse, supra; United Air Lines v. Mahin, supra; Perkins v. Benquet Consol. Mining Co., supra; Missouri v. Mayfield, supra; State Tax Commission v. Van Cott, supra; Red Cross v. Atlantic Fruit Co., supra.

If the decision below remains uncorrected, capital defendants will face trial in North Carolina under a considerably more mandatory statute than the General Assembly may have intended. Moreover, the decision below stands as a bar to any revision of the statute to permit a greater measure of jury discretion as long as the General Assembly desires to maintain a constitutional statute. See, Woodson, 428 U.S. at 300. Accordingly, this Court should grant certiorari in order to "remand the case to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under (this Court's) decisions, to do so.' Perkins v. Benquet Consol. Mining Co., 342 U.S. at 433." United Air Lines v. Mahin, 410 U.S. at 632.

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Kermit Smith, Jr., by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner's affidavit in support of this motion is attached hereto.

Dwight L. Cranford

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ATTORNEY FOR PETITIONER

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NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

KERMIT SMITH, JR.,
Petitioner,

- against -

STATE OF NORTH CAROLINA,
Respondent.

I, Kermit Smith, Jr., being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. At trial, and on appeal, lawyers have been appointed to represent me because I am indigent. Counsel is presently serving on my behalf without pay.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Halifax County, a trial court of the State of North Carolina, of murder and common law robbery and second degree rape, and was sentenced to death. I am being held at the North Carolina Central Prison in Raleigh, North Carolina. I believe that errors were committed

during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

Kermit Smith, Jr.

KERMIT SMITH, JR.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

The foregoing affidavit of Kermit Smith, Jr. was subscribed and sworn to before me, this 27 day of August, 1982.

Johnnie M. Temple

Notary Public

My commission expires:

My Commission Expires 5-25-87

JOHNNIE M. TEMPLE NOTARY PUBLIC WAKE COUNTY, N.C.

IN THE SUPREME COURT OF NORTH CAROLINA

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IN THE OFFICE OF CLERK SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
v.) No. 124A81 - Halifax
)
KERMIT SMITH, JR.)

On appeal by defendant as a matter of right from the judgment of Fountain, Judge, entered at the 27 April 1981 Criminal Session of Halifax Superior Court, imposing the sentence of death upon the conviction of first degree murder. Defendant's motion to bypass the Court of Appeals for review of his additional convictions of second degree rape and common law robbery was allowed on 7 October 1981.

Defendant was charged in indictments, proper in form, with the first degree murder, first degree rape and armed robbery of Whelette Collins. The charges were consolidated for trial over defendant's objection. The jury subsequently found defendant guilty of first degree murder, second degree rape and common law robbery. The trial court ordered the imposition of the death penalty for the murder conviction in accordance with the jury's recommendation. The trial court also sentenced defendant to consecutive prison terms of forty years and ten years for his convictions of rape and robbery, respectively.

The State's evidence tended to show the following. Three black girls, Whelette Collins (the victim), Dawn Killen and Yolanda Woods, were students and cheerleaders at Wesleyan College in Rocky Mount, North Carolina in December 1980. During the early evening hours of 3 December 1980, the girls cheered at a basketball game

held in the college gymnasium. After the game was over, the girls left the gym and walked to Whelette Collins' automobile which was parked at a nearby campus lot. It was approximately 7:30 p.m. [The girls were still wearing their cheerleading uniforms.] The girls had just gotten into the car and were preparing to depart when the defendant, a young white male, suddenly appeared at a window and asked for a ride to the highway. They told this stranger that they were not going in the direction of the highway and refused his request. Defendant thereupon brandished what appeared to be a pistol and demanded entrance into the vehicle.[1] He then got into the car, in the back seat behind the driver. He told the girls that he was an escaped convict and needed a lift to his getaway car. He also told them that they were simply "at the wrong place at the wrong time." Whelette Collins then proceeded to drive where defendant directed, as he continued to hold the gun in his hand.

The group eventually reached and stopped at the place where defendant's automobile was parked in some woods not far from campus. [They had been driving around for a while in what seemed to be circles.] Defendant took the key to the Collins' car and asked the girls if they had any money. Dawn Killen and Yolanda Woods replied that they did not have their handbags with them.

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[1]It was later discovered (and shown at trial) that this pistol could not fire a bullet and was not, therefore, a deadly weapon in reality. It was a blank .22 or "toy" pistol, similar to that used to start races, with mud in its barrel. The pistol's true character was not, of course, immediately apparent in the dark or to one unfamiliar with firearms.

Whelette Collins said she had "a little bit." Defendant ordered the girls to get out of the car. Dawn and Yolanda got down on the ground and began to pray. While they were doing so, they overheard a discussion between defendant and Whelette about the money. Defendant asked Whelette, "is that all?" because she only had $7.00. Defendant then took the key to Whelette's car and told the girls to go to the other car. He explained that he was going to drive them to another location, about forty miles away, so he could have "plenty of time to get away" before the police were notified. Defendant made Dawn and Yolanda get into the trunk of his car and, because there was not enough room for her there, told Whelette to lie face down on the back seat.

Defendant then drove the girls to a quarry pit in a heavily wooded area adjacent to the Roanoke River in Halifax County near Weldon, North Carclina. They arrived at this place at approximately 9:30 p.m.

Defendant told the girls that they would have to wait in this deserted spot with him until "his friend" came with another car at 12:00 or 1:00. The girls were uncomfortable because it was extremely cold that night (below freezing). They were also very frightened because defendant kept telling them that "his friend" would kill them if he discovered that defendant "had taken all these people hostage." Defendant also warned the girls that he might have to hurt them if they did not listen to him.

During the course of the evening, defendant forced Dawn and Yolanda to get back into the trunk of his car and shut it. He

said he was going to show Whelette the way back to the highway. The girls in the trunk could hear defendant talking to Whelette. He was telling her that she was "very pretty," that he "couldn't tell whether she was black or white or Italian because she was very fair" and that "if they had met under different circumstances they might be friends or something like that." The girls in the trunk then heard a scuffle and a frightened scream. Whelette yelled out and started running away. Defendant slammed the keys down on top of the trunk and said to its helpless occupants, "I'll be right back." Shortly thereafter, the two girls thought they heard the sounds of gunshots.

About an hour and a half later, Dawn and Yolanda heard someone crying. Whelette knocked on the trunk and asked her friends how they were. They said they were fine and asked Whelette if she "was all right." Whelette replied, "no, she wasn't all right." Whelette was still crying, and her friends "could hear the pain and everything in her voice." Whelette asked defendant, "why had he done this to her." He said, "you don't understand my motivation." Whelette then told defendant that she was cold and asked him to get a blanket out of the trunk for her. Defendant refused and told her that the other girls needed the blanket to keep warm. Whelette complained, however, that "they have their clothes on and they have coats and I don't and I'm cold." Defendant merely responded, "your friends would get upset if they saw you standing here without any clothes on." He then snickered and said to her, with a sadistic

tone in his voice, "I can put you out of your misery." A while later, he told Whelette that they would go back to where he had thrown her clothes.

For over an hour, Dawn and Yolanda heard nothing but "dreaded silence." Defendant subsequently returned to the car and opened the trunk. He was alone. The girls inquired as to Whelette's whereabouts. Defendant told them that she had stopped at the quarry to use the bathroom. They called for her but received no reply. Defendant suggested that one of them go with him to look for Whelette. Dawn and Yolanda refused to do so unless both went, and they stayed in the trunk.

About twenty minutes later, defendant permitted the girls to get out of the trunk. He was "shaking." He told the girls that:

> None of this would have happened if [they] had had some checkbook or some money with [them], because he was cold and his family didn't have any money and didn't have any heat and he wanted -- he really needed money, so thinking that he would realize it was around Christmas time, most college students have money to go home.

At this point, Dawn and Yolanda told defendant that they had money back in Rocky Mount. Defendant agreed to take them there to get it. The girls got in the car again, and defendant began to drive away. He did not, however, drive in the direction of the highway; instead, he drove them even deeper into the woods. When defendant stopped the car again, Yolanda and Dawn attacked him with a straight pin and a lug wrench which they had concealed on their persons during their sojourn in the trunk. [During the struggle, the girls noticed that defendant was wet, particularly his pants.] Defendant told the girls

that he was going to kill them. Yolanda, however, wrestled the gun from defendant's grasp and unsuccessfully tried to shoot him with it (see note 1, supra). The girls then ran away and hid in some nearby underbrush until daylight. [It was then 4:30 a.m. on 4 December 1980.] As they waited there, they heard a splash as defendant threw "something into the water." The girls did not see or hear their companion Whelette during this time.

At about 7:00 a.m., Dawn and Yolanda began to make their way out of the woods. When they reached the interstate highway, they flagged down a vehicle and told its driver their horrible story. Law enforcement officials were soon contacted (by 9:00 a.m.). The girls gave the officers the gun they had taken from defendant and described the place where they had been restrained throughout the night. The Sheriff of Halifax County, William Clarence Bailey, arranged for the girls to be transported to the area of a gravel pit on the Roanoke River with which he was familiar. The scene of the crimes was subsequently located.

Defendant was attempting to leave the area when the officers and witnesses arrived. He was bloody, his clothes were wet, water was running off of his hair, and he was barefoot. Dawn and Yolanda identified him as their assailant on the spot, and he was quickly apprehended and arrested.

As soon as defendant was in custody, police officers began searching the woods for Whelette Collins. Many items of evidence were found, including the victim's clothes, defendant's wet and bloody underwear, and two cement blocks with blood, hair and skin

on them. The nude body of Whelette Collins was recovered from a shallow pond. Her feet were jammed into a cement block. An autopsy was performed very soon thereafter.which revealed the following. Live sperm were in the deceased's vaginal area, there were numerous lacerations and bruises about her face and body, and several of her ribs were fractured. The victim's skull was severely fractured in several places due to the force of blunt trauma to her head. There were also scratches and scrapes on the back of the body which indicated that it had been dragged on the ground. It was determined that Whelette Collins died as a result of the head injuries she had received and not from drowning. [There was no water in her lungs.]

Defendant was also searched by police officers shortly after his arrest. Seven dollars in currency and a ring were retrieved from his person. The ring belonged to Whelette Collins. No money was found in her clothing. Defendant was properly advised by the officers not to make any statement at that time. Despite these admonitions, however, defendant told them that: "it won't even a real gun anyway. I was just trying to scare the girls. . . . I think she was dead before I threw her in the pond anyway."

Defendant offered no evidence at the guilt phase of his trial.

The State did not offer additional evidence at the sentencing hearing held pursuant to G.S. 15A-2000. However, four witnesses testified in defendant's behalf, including his father and two psychiatrists. In sum, the testimony of these witnesses tended to

show the following. Defendant was twenty-three years old, physically healthy, legally sane and very intelligent. However, defendant had "antisocial personality," a disorder in which "the moral and acted principles of the mind are strongly perverted or depraved, the power of self-government is lost or greatly impaired and the individual is bound to be incapable . . . of conducting himself with decency and propriety in the business of life." Because he was small in stature, defendant felt inferior, inadequate and mistreated. He had difficulty getting along with other people and did not have normal social relationships. He was maladjusted, did not respect the rights of others, and often behaved as if he was trying to "get back at the world." He could not keep a job and had attempted suicide once. He had also been to prison for stealing and was homosexually assaulted and harassed there. Defendant had many sexual problems, which included aggressive fantasies, peeping and cross-dressing (impersonating a female), and he was "extremely sensitive" to rejection by women. Both psychiatrists stated that, in their opinions, defendant was under the influence of an emotional disturbance at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was also impaired.

Other relevant facts shall be related in the opinion.

Attorney General RUFUS L. EDMISTEN, by Assistant Attorney General DONALD W. STEPHENS, for the State.

DWIGHT L. CRANFORD for the defendant-appellant.

COPELAND, Justice.

Defendant contends that various errors require either a new trial upon all of the charges or a new sentencing hearing. We disagree and affirm defendant's convictions and the sentences of death and imprisonment imposed upon him for the brutal murder, rape and robbery of Whelette Collins.

GUILT PHASE: I - IV

I.

Prior to trial, defendant filed written motions requesting individual voir dire and sequestration of the jurors during voir dire and sequestration of the jury and the State's witnesses during the trial pursuant to G.S. 15A-1214(j), -- 1225, -- 1236(b). Judge Fountain denied these motions on the day of trial. In his brief, defendant concedes that these matters were addressed to the sound discretion of the presiding judge and that this record fails to disclose prejudicial error or an abuse of discretion in the judge's rulings.[2] We agree. See, e.g., State v. Moore, 301 N.C. 262, 271 S.E. 2d 242 (1980); State v. Johnson (I), 298 N.C. 355, 259 S.E. 2d 752 (1979); State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137 (1980).

Defendant nonetheless complains that the judge should have permitted oral argument by counsel before he ruled upon the motions. This complaint is neither well-founded nor timely. There is nothing in the record which suggests that Judge Fountain, either by word or deed, intended to prevent defense counsel from speaking in support

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[2]Defendant does not challenge the jury which was subsequently empanelled to try him or contend that there was collusion among the witnesses who testified against him.

of the written motions. To the contrary, the record generally shows that counsel did not have anything to say beyond that which, was already fully stated in the motions themselves and elected not to utilize his opportunity to be heard.[3] If, however, as defendant now contends, vigorous oral argument upon these matters was truly desired, it would have been quite simple and most prudent to have informed the trial court of it by means of an express request to be heard. Defendant, however, stood silently by and did not object to the manner in which the court conducted its proceedings upon the discretionary motions. In these circumstances, defendant has waived whatever objection he may have had, and his belated complaint may not be "heard" on appeal. In any event, we seriously doubt that a mere refusal by the trial court to receive supportive oral argument would, in and of itself, demonstrate substantive, reversible error in the denials of discretionary motions under G.S. 15A-1214, -- 1225, -- 1236.[4] The assignment of error is overruled.

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[3] Indeed, defendant has not apprised this Court of what else could have or would have been said in furtherance of the motions if the necessary opportunity, which he alleges was denied by the trial court, had instead been affirmatively provided to him and his counsel.

[4] We note that, although fundamental fairness would seem to require it, at least when a proper and timely request therefor is made, none of these statutes specifically mandates the receipt and consideration of oral arguments prior to the entry of final rulings by the trial court.

II.

Defendant was indicted for armed robbery. Upon his motion, however, the trial court reduced this charge to common law robbery at the conclusion of the State's evidence. Defendant assigns error to the trial court's subsequent failure to set aside the jury's verdict of guilty of the lesser offense upon the ground that the State's evidence was also insufficient to show his commission of that crime.

Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear. State v. Moore, 279 N.C. 455, 183 S. E. 2d 546 (1971); State v. Lawrence, 262 N.C. 162, 136 S.E. 2d 595 (1964). Defendant maintains that, although there was evidence to support an inference that he unlawfully took $7.00 and a ring belonging to Whelette Collins, there was absolutely no evidence to support a conclusion that he stole these items from her while she was alive through the use of force or fear. The record plainly refutes this contention.

All of the State's evidence, both direct and circumstantial, must be viewed in the light most favorable to the State with every reasonable intendment being made in its favor. See State v. Simpson, 303 N.C. 439, 279 S.E. 2d 542 (1981); State v. Agnew, 294 N.C. 382, 241 S.E. 2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978). The pertinent evidence in this respect has been set forth in the lengthy recital of the evidence at the beginning of this opinion, and easy reference can be made thereto. It suffices to say here that the State's evidence was certainly substantial

enough to convince a rational trier of fact that defendant, who had gone to the college intending to steal money from students, took money from Whelette Collins as he threatened her with what appeared to be a deadly weapon, soon after he kidnapped her and her two companions, at the nearby spot where he transferred the girls to his own car. This was long before he finally raped and killed her at the distant, deserted rock quarry. That being so, the instant case is clearly distinguishable from State v. Powell, 299 N.C. 95, 102, 261 S.E. 2d 114, 119 (1980), where our Court held that a charge of armed robbery should have been dismissed because the evidence only indicated that the defendant had committed larceny by taking certain objects "as an afterthought once the victim had died." In contrast, the evidence before us now tends to show that defendant robbed the victim of what little money she had while she was with her companions and still very much alive and afraid. Consequently, we uphold defendant's conviction of common law robbery.

III.

Defendant argues that the trial judge did not fully state his "numerous" contentions concerning the charges against him and unfairly gave greater stress to the contentions of the State in his final instructions to the jury. The argument is without merit.

To start with, defendant waived any objection to the manner or length of the judge's statements of the contentions of either side by failing to make an appropriate challenge at trial before the jury retired. State v. Virgil, 276 N.C. 217, 172 S.E. 2d 28 (1970);

State v. Goines, 273 N.C. 509, 160 S.E. 2d 469 (1968). However, even if defendant had properly preserved such an exception for our review, we would not find prejudicial error upon this record.

This is not a case in which the trial court utterly failed to state <u>any</u> of the defendant's contentions after reciting those of the State. <u>See</u>, <u>e.g.</u>, State v. Hewitt, 295 N.C. 640, 247 S.E. 2d 886 (1978). Rather, Judge Fountain generally referred to defendant's contentions throughout his charge to the jury, as follows:

> He contends . . . from the evidence offered, that you should not be satisfied from that evidence and beyond a reasonable doubt that he is guilty of anything or that, if you find him guilty of anything, that you should find him guilty of only the least aggravating offense with which he is charged. But, actually, he contends, members of the jury, by his plea of not guilty, that he is innocent; that the State has failed to prove his guilt and that, under all the circumstances, you should acquit him of all charges.
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> . . . .
>
> . . . Of course, the defendant contends that you should have a reasonable doubt that he killed her. He contends that you should acquit him of the charge of murder in the first degree.
>
> . . . .
>
> . . . If he did not take any money from her, he could not be guilty of common-law robbery. . . .
>
> As to that, the defendant contends that there is no evidence sufficient to justify you finding that he took any money from her or that, if he did, it resulted from violence or putting her in fear. . . . He contends that it didn't happen and that he did not put her in fear. Record at 63, 66 and 68.

It is true that defendant's contentions, as stated by the trial court, <u>supra</u>, seem sparse or brief in comparison to those

presented in the State's behalf. However, the requirement that equal stress must be given to the contentions of both sides does not mean that the respective statements thereof must also be of corresponding lengths, consuming similar amounts of time. State v. Banks, 295 N.C. 399, 245 S.E. 2d 743 (1978); State v. King, 256 N.C. 236, 123 S.E. 2d 486 (1962); State v. Sparrow, 244 N.C. 81, 92 S.E. 2d 448 (1956). In the case at bar, defendant did not offer independent evidence at the guilt phase, he only elicited minor evidence upon cross-examination which tended to detract from, and not substantively negate, the weight of the State's circumstantial evidence, and he did not specifically request further elaboration by the trial court upon any point of contention in the case. Under these circumstances, the record as a whole convinces us that Judge Fountain adequately and fairly summarized defendant's essential contentions. See State v. Spicer, 299 N.C. 309, 261 S.E. 2d 893 (1980); see also State v. Moore, 301 N.C. 262, 271 S.E. 2d 242 (1980).

IV.

In the course of its instructions upon the premeditation and deliberation elements of first degree murder, the trial court told the jury that there was no evidence of "any just cause or legal provocation to kill" in the case. Defendant believes that the trial court thereby violated G.S. 15A-1222 which prohibits the expression of an opinion upon any question of fact to be decided by the jury. We hold that the isolated comment was not erroneous or prejudicial.

First, we do not believe that Judge Fountain's reference

to the <u>complete</u> <u>absence</u> of certain evidence constituted an impermissible opinion upon a controverted fact. Rather, the contested statement was merely a legal recognition, correctly made upon the record, that the State's evidence had not disclosed the presence of just cause or adequate provocation to excuse the killing and that the defendant had not fulfilled his burden of going forward with or producing any such evidence either. <u>Cf.</u> State v. Boone, 299 N.C. 681, 263 S.E. 2d 758 (1980); State v. Tate, 294 N.C. 189, 239 S.E. 2d 821 (1978); State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (1975), <u>rev'd on other grounds</u>, 432 U.S. 233, 97 S.Ct. 2339, 53 L. Ed. 2d 307 (1976). Two analogous decisions of this Court are instructive and implicitly supportive of the conclusion we reach here: State v. Byrd, 121 N.C. 684, 28 S.E. 353 (1897), and State v. Capps, 134 N.C. 622, 46 S.E. 730 (1904). In <u>Byrd</u>, the Court held that in the absence of "any evidence, even a scintilla, tending to show self-defense. . . . it was proper for the court to instruct the jury that there was no such evidence." 121 N.C. at 685, 28 S.E. at 353. In <u>Capps</u>, the Court also stated that "whether there is any evidence . . . to rebut the implied malice [in a killing] is a question of law." 134 N.C. at 628, 46 S.E. at 732. In a similar vein, we are also persuaded that it is not error for the trial court simply to inform the jury as to whether or not <u>specific</u> evidence relevant to justification or mitigation has been <u>introduced</u> in a homicide prosecution. This is determined as a matter of law, not of fact. Such an instruction does not therefore invade or interfere with the exclusive province of the jury to decide and weigh the facts

presented, and, in reality, it amounts to little more than a "summary" of the pertinent evidence upon a particular aspect of the case.

Secondly, there is no indication that Judge Fountain's statement wrongfully or absolutely withdrew from the jury's consideration any circumstances which might have tended to negate premeditation, deliberation or malice in the charged killing, or that it improperly removed from the State the burden of proving the existence of those elements beyond a reasonable doubt. See Record at 65-66. Simply put, there is no reason to believe that the jury was misled or confused by the trial court's remark; thus, we can perceive no ascertainable prejudice to defendant in any event.

PENALTY PHASE: V - VIII

V.

At the sentencing hearing, two psychiatrists stated opinions that defendant suffered from the emotional disturbance of antisocial personality, and, as a result, his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired at the time of the murder. The trial court accordingly submitted to the jury, inter alia, the corresponding factors of G.S. 15A-2000(f) (2) and (6) in mitigation of defendant's crime. The jury subsequently found that defendant had committed the murder under the influence of a mental or emotional disturbance, G.S. 15A-2000(f) (2); however, it did not find that defendant's capacity was also impaired at the time, G.S. 15A-2000(f) (6).

Defendant contends that the trial court erred by failing to give a requested peremptory instruction concerning the impairment of his capacity in light of the "uncontradicted" expert opinions, supra, and by not explaining more fully or clearly the legal nature of that mitigating circumstance.[5]

Our analysis of defendant's contentions about the trial court's instructions regarding the mitigating circumstance of G.S. 15A-2000(f)(6) is governed by the standards set forth in our previous decision in State v. Johnson (I), 298 N.C. 47, 257 S.E. 2d 597 (1979). In Johnson (I), the Court held that, although the defendant has the burden of proving the existence of a mitigating circumstance, upon a proper request "[w]here . . . all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance," but that such "[a] peremptory instruction is inappropriate when there is conflicting evidence on [that] issue." 298 N.C. at 76-77, 257 S.E. 2d at 618. The trial court did not err in failing to give a peremptory instruction about the defendant's impairment under G.S. 15A-2000(f)(6) in Johnson (I) because there was lay testimony in the case which supported a finding contrary to that advanced by an expert who testified in defendant's behalf upon the issue. However, this Court was compelled to order a new

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[5]At the outset, we note that the trial court also denied defendant's request for a peremptory instruction upon the mitigating circumstance of a mental or emotional disturbance. However, defendant did not assign error to this denial since it obviously did not "impair" the jury's ability to make a finding favorable to him upon the issue.

sentencing hearing in Johnson (I) upon another ground: the trial court's inadequate treatment of the impairment issue in its substantive instructions to the jury. On this point, Justice Exum, speaking for the Court, said the following:

> The trial court should have explained the difference between defendant's capacity to know right from wrong which defendant conceded he possessed, and the impairment of his capacity to appreciate the criminality of his conduct from which his evidence indicated and he contends he suffered. While defendant might have known that his conduct was wrong, he might not have been able to appreciate, i.e., to fully comprehend, or be fully sensible, of its wrongfulness. Further while his capacity to so appreciate the wrongfulness of his conduct might not have been totally obliterated, it might have been impaired, i.e., lessened or diminished. The trial court should also have more carefully explained that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should nevertheless find the existence of this mitigating factor if it believed that defendant's capacity to conform his conduct to the law, i.e., his capacity to refrain from illegal conduct, was impaired. Again, this does not mean that defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

298 N.C. at 69-70, 257 S.E. 2d at 614; see also State v. Johnson (II), 298 N.C. 355, 373-75, 259 S.E. 2d. 752, 763-65 (1979). Applying these principles to the case at bar, we hold that Judge Fountain's instructions upon G.S. 15A-2000(f)(6) were consistent with the evidence and sufficient under the law.

Ample evidence was introduced at the guilt phase of the trial which authorized a reasonable inference and conclusion by the jury that defendant had the capacity to appreciate the character of his conduct and the ability to conform it to legal requirements

when he murdered Whelette Collins, despite the contrary opinions of the psychiatrists. For example, the testimony of Dawn Killen and Yolanda Woods, the surviving girls who were restrained by the defendant for over nine hours on the night in question, generally tended to show that, from the very beginning to its tragic end, defendant executed a deliberate and carefully thought-out plan to fulfill certain criminal intents and satisfy his perverted lust, that he quickly recognized and adjusted to any new obstacles or barriers to his desired goals as such appeared, and that he was constantly aware of the legal implications of his various actions. In particular, these girls testified that, at several critical junctures in the evening's events, defendant calmly contemplated what he should do next and took special precautions against the possibility of being apprehended by the police, including the removal of his fingerprints from the victim's car, the transport of the girls to a secluded spot, and the evaluation of whether they had been able to see enough in the dark to identify him or his car. Record at 10, 11, 13 and 37. The additional facts demonstrated by the State concerning defendant's callous remark to the victim, after the rape, that he could put her out of her misery and his later attempt to conceal her body by "anchoring" it with a cinder block in the pond also conflicted with the psychiatrists' after-the-fact opinions that defendant was legally unaware of and lacked control over his actions as he effected a sordid scheme culminating in murder. We shall not belabor this further. In sum, there was plenary other evidence in the record which sufficiently, if not equally, suggested

that defendant was in complete control of his faculties when he committed the capital crime, comparing it against the expert evidence showing the presence of a legal impairment, and it was the jury's duty to decide what to believe. As all of the evidence did not therefore support the existence of the mitigating circumstance of G.S. 15A-2000(f)(6), the trial court correctly refused to give defendant's requested peremptory instruction upon it. State v. Johnson (I), supra.

Judge Fountain also competently explained the difference between legal insanity totally excusing a crime and legal impairment merely mitigating the punishment for a crime and properly emphasized that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law only had to be "lessened or reduced" in order for this mitigating circumstance to exist. The able judge additionally reminded the jury that defendant was relying upon "the evidence of the doctors" and "his history of psychiatric problems" to establish his diminished or impaired capacity at the time of the murder. Record at 93-94. As a whole, these instructions complied fully with the essential dictates of Johnson (I) and (II), supra, as to the required extent and substance of a charge upon G.S. 15A-2000(f)(6). See also N.C.P.I. -- Crim. §150.10, at 30-33 (1980).

VI.

The form of the sentencing issues submitted to the jury and their answers thereto were as follows:

ISSUE NO. ONE:

Do you unanimously find from the evidence beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

ANSWER: Yes.

1. Was the murder committed while the defendant was engaged in the commission of or attempt to commit rape of the deceased?

ANSWER: Yes.

2. Was the murder committed while the defendant was engaged in the commission of or attempt to commit robbery of the deceased?

ANSWER: Yes.

3. Was the murder committed while the defendant was engaged in the commission of or attempt to commit kidnapping of the deceased?

ANSWER: Yes.

4. Was the murder especially heinous, atrocious or cruel?

ANSWER: Yes.

ISSUE NO. TWO:

Do you find that one or more of the following mitigating circumstances exist?

1. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

ANSWER: Yes.

2. At the time of the murder, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: No.

3. The age of the defendant at the time of the crime.

ANSWER: No.

4. That the defendant has no significant history of prior criminal activity.

ANSWER: No.

5. Are there any other circumstances arising from the evidence which you, the jury, deem to have mitigating value?

ANSWER: No.

ISSUE NO. THREE:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

ANSWER: Yes.

ISSUE NO. FOUR:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Record at 100 - 01.

The trial court twice instructed the jury that it should proceed to issue four only after answering issues one and three affirmatively and, then if it also answered that final issue affirmatively, that it would have the "duty" to return a verdict of death against the defendant. Record at 96-99. Defendant argues that the trial court thereby erroneously impeded "a truly individualized assessment of the propriety of the death penalty" by the jury in contravention of the provisions of G.S. 15A-2000.

We upheld an identical instruction in State v. Pinch, also decided this date. We held there that the trial court had correctly advised the jury "that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c)." [Issues one, three and four, supra, correspond to these necessary statutory findings.] Among other things, the Court reasoned that:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused."

___ N.C. ___, ___, ___ S.E. 2d ___, ___ (1982)(citations omitted).

We believe that this reasoning applies with even greater force in the instant case since Judge Fountain carefully explained to the jury that it should exercise its full and considered discretion in deciding issue four, supra:

> That is for you to determine depending upon how you find from the case, from the issues you've answered. It is not something you would answer according to whim or caprice or guesswork, but you would weigh all the circumstances that you have found, if any, to be aggravating, those that you've found to be mitigating, and determine whether you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial; that is, sufficiently important to call for the imposition of the death penalty. If the State has satisfied you from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty, you would answer that, Yes; otherwise, you would answer it, No. Record at 96-97.

It was only after this clear direction, which comports with the procedure contemplated in G.S. 15A-2000(b), that Judge Fountain further told the jury that it had a duty to recommend capital punishment upon its affirmative answer to issue four.

We hold that Pinch, supra, constitutes sound and binding autnority and is indistinguishable from the case at hand; consequently, we must overrule defendant's assignment of error. Acoord State v. Williams, ___ N.C. ___, ___ S.E. 2d ___ (filed this date); State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979); N.C.P.I. -- Crim. §150.10 (1980).

VII.

Defendant contends that the trial court should have instructed the jury that the court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment. This contention is meritless. Our Court has previously decided that it is improper for the jury to consider what may or may not happen in the event it cannot reach a unanimous sentencing verdict. State v. Hutchins, 303 N.C. 321, 353, 279 S.E. 2d 788, 807 (1981); State v. Johnson (II), 298 N.C. 355, 369-70, 259 S.E. 2d 752, 761-62 (1979). We shall take this opportunity, however, to state our agreement with the observation made by the Virginia Supreme Court, in a case cited to us in the State's brief, that such an instruction would be tantamount to "an open invitation for the jury to avoid its responsibility and to disagree." Justus v. Commonwealth, 220 Va. 971, 979, 266 S.E. 2d 87, 92 (1980); accord

Houston v. State, 593 S.W. 2d 267, 278 (Tenn. 1980).

VIII.

Defendant finally makes a sweeping assertion, based upon all of his prior contentions, that the trial court should have set aside the jury's recommendation of death upon its own motion. Judge Fountain had no authority to do so after the jury had made the necessary findings to support imposition of the death penalty under G.S. 15A-2000(c). Our Court has previously stated that the trial court does not have "the power to overturn a death sentence" and that the lower court is "obligated to enter judgments consistent with the jury's unanimous recommendation that defendant be sentenced to death." State v. Hutchins, 303 N.C. 321, 356, 279 S.E. 2d 788, 809 (1981); State v. Johnson (II), 298 N.C. 355, 371, 259 S.E. 2d 752, 762 (1979).

IX.

Pursuant to the mandate of G.S. 15A-2000(d), this Court accords the greatest diligence and care in the review of a capital case. We have fully considered all of defendant's assignments of error in the record on appeal. We are convinced that defendant's trial and sentencing hearing upon the charged offenses were fairly conducted without the commission of prejudicial error.

The judgment of death was lawfully imposed. The evidence supported the submission of the aggravating circumstances of G.S. 15A-2000(e)(5), upon the separate theories of the rape, robbery and kidnapping of the deceased, and 15A-2000(e)(9), that the murder was especially heinous, atrocious or cruel. We find no indication

in the record that the death penalty was recommended by the jury under the influence of passion or prejudice. Finally, we hold that the sentence of death for the intentional, deliberate and senseless murder of Whelette Collins was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See, e.g., State v. Pinch, ___ N.C. ___, ___ S.E. 2d ___ (filed this date); State v. Williams, ___ N.C. ___, ___ S.E. 2d ___ (filed this date); State v. Taylor, 304 N.C. 249, 283 S.E. 2d 761 (1981). Defendant's criminal acts were certainly as reprehensible as those committed by the defendants in State v. Rook, 304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied, ___ U.S. ___, ___ S.Ct. ___, ___ L. Ed. 2d ___ (1982), and State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980), cert. denied, 450 U.S. 1025, 101 S.Ct. 1731, 63 L. Ed. 2d 220 (1981). The State's evidence revealed that the nineteen year old victim suffered agonizing and humiliating torture at the merciless hands of the defendant who kidnapped her, raped her, cruelly mocked her as she stood naked in the cold and finally beat her to death in a wanton, brutal manner using a cinder block. Mere words are insufficient vehicles to describe the tragic horror of what happened to this poor girl and not even capital punishment can fully repay the price of her inexplicable and needless suffering.

We find no error in the guilt or penalty phases of defendant's trial.

NO ERROR.

Justice CARLTON did not participate in the consideration or decision of the case.

No. 124A81 - State v. Smith

Justice Exum dissenting as to sentence.

For the reasons stated in Part I of my dissent in State v. Pinch, ____ N.C. ___, ___ S.E.2d ___ (filed this date), I disagree with the majority's conclusion in Part VI of its opinion. In my view it was prejudicial error for the trial judge to instruct the jury that it had a duty to recommend the death sentence if it answered certain issues favorably to the state. My vote, therefore, is to vacate the judgment imposing the death sentence and remand for a new sentencing hearing.

I concur in the majority's conclusion that there is no error in the guilt phase of the case.

15D18-110

JUDGMENT

DEATH CASE

SUPREME COURT OF NORTH CAROLINA

FILED
1982 JUN 23 AM 8 53
HALIFAX COUNTY, C.S.C.
BY ABS

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX19.82

STATE OF NORTH CAROLINA

vs.

KERMIT SMITH, JR.

No. 124A81 Halifax County.

This cause came on to be argued upon the transcript of the record from the Superior Court Halifax *County:*
Upon consideration whereof, this Court is of opinion that there is no *error in the record and proceedings of said Superior Court.*

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

Honorable J. WILLIAM COPELAND, Associate *Justice, be certified to the said Superior Court, to the intent that* XX
PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

And it is considered and adjudged further, that the Defendant Do Pay

the costs of the appeal in this Court incurred, to wit, the sum of

****ONE-HUNDRED TWENTY-SIX AND 00/100**** *dollars ($* 126.00 *),*

and execution issue therefor. Certified to Superior Court this 22nd *day of* June *19* 82.

A TRUE COPY

A TRUE COPY
CLERK OF SUPERIOR COURT
HALIFAX COUNTY
BY [signature]
Assistant, Deputy, Clerk Superior Court

J. GREGORY WALLACE
By: [signature] Clerk of the Supreme Court.
Chief Deputy Clerk

(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

(4) If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(1977, 2nd Sess., c. 1147, s. 29.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivisions (2) and (4) of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Failure of Trial Judge to Rule within 10 Days. — There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under subsection (a)(4) of this section which provides that, if no ruling has been made by the trial judge on a motion for appropriate relief within 10 days, the motion is deemed denied. State v. Brooks, 49 N.C. App. 14, [illegible] S.E.2d 592 (1980).

Applied in State v. Ervin, 38 N.C. App. [illegible], 248 S.E.2d 91 (1978).

Cited in State v. Morris, 41 N.C. App. [illegible], 254 S.E.2d 241 (1979); State v. Evans, [illegible] N.C. App. 327, 264 S.E.2d 766 (1980).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is

discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

Effect of Amendments. — The first 1979 amendment added subdivision (11) to subsection (e).

The second 1979 amendment, effective January 1, 1980, inserted "or a sex offense" near the middle of subdivision (5) of subsection (e).

The 1981 amendment inserted "homicide" near the middle of subdivision (5) of subsection (e).

Session Laws 1981, c. 652, s. 2, provides: "This act is effective upon ratification and applies to capital felonies committed on or after that date."

Session Laws 1979, c. 565, s. 2, provides: "This act is effective upon ratification and shall apply to all offenses committed after the date of its ratification." The act was ratified May 14, 1979.

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Constitutionality. — For discussion of the constitutionality of the North Carolina Death Penalty Statutes, see State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

For discussion of factors governing interpretation of the death penalty statute, see State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Imposition of Penalty Not Mandatory. — The present North Carolina death penalty statutes are not mandatory in nature but instead

provide for the exercise of guided discretion in the imposition of sentence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

No Authority to Avoid Statutory Scheme in Proper Case. — In a prosecution for first-degree murder, where there was evidence which tended to show the especially heinous, atrocious, and cruel manner in which the victim was clubbed to death, an aggravating circumstance listed in subsection (e)(9) of this section, the presiding judge, district attorney, and defense counsel had no legal authority whatsoever: (1) to announce that the State would not seek the death penalty, (2) to agree to make no motions concerning the death penalty, (3) to eliminate voir dire examinations of jurors with respect to the death penalty, (4) to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment, or (5) by consent to fix the punishment at life imprisonment should the jury convict defendant of murder in the first degree. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Effect of Guilty Plea on Determination of Sentence. — The question of sentence in a capital case is to be determined in the same manner whether a defendant pleads guilty to the capital offense or is found guilty by a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

A defendant may not plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Conditional Guilty Plea Not Permitted. — In a capital case, the trial judge did not err in construing this section and § 15A-2001 as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

When Refusal to Sanction Plea Negotiation Proper. — Where, in a capital case, there is evidence tending to show the existence of two aggravating factors, i.e., that the murder occurred in the course of a rape or attempted rape and that the murder was especially heinous, atrocious and cruel, the issue whether the death penalty should be imposed is thus necessarily one for the jury, and it would not be error for the trial court to refuse to sanction a proposed plea negotiation. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Duty of Jury in Assessing Appropriateness of Penalty. — The deliberative process of the jury envisioned by this section is not a mere counting process. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. Nuances of character and circumstance cannot be weighed in a precise mathematical formula. At the same time, it would be improper to instruct the jury that they may disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. State v. Goodman, 298 N.C. 1, 257 S.E.2d [illegible] (1979).

Aggravating Circumstances in Felony Murder Cases. — When a defendant is convicted of first-degree murder under the felony murder rule, the trial judge may not submit to the jury at the sentencing phase of the trial an aggravating circumstance concerning the underlying felony. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d [illegible] (1980).

Aggravating Circumstances in Felony Murder Cases. — Where defendants were convicted of the capital offense of first-degree murder on the theory that the murder was committed during the perpetration of an armed robbery, it was error for the court to submit the underlying felony of armed robbery to the jury in the sentencing phase of the trial as an aggravating circumstance, and defendants, who were sentenced to death were entitled to a new sentencing hearing since the jury may well have decided that the remaining aggravating circumstances were not sufficiently substantial to call for imposition of the death penalty had the jury not considered the underlying felony as an aggravating circumstance. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Same — Murder for Pecuniary Gain. — There is no error in submitting the aggravating circumstance as to whether a murder was committed "for pecuniary gain" in a felony-murder case in which the underlying felony is robbery notwithstanding the rule that the robbery itself cannot be submitted as such a circumstance, since the circumstance that the capital felony was committed for pecuniary gain does not constitute an element of the offense. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a prosecution for the first-degree murder of a storekeeper during the perpetration of an armed robbery and the first-degree murder of an innocent bystander who had pulled up to the store to purchase gas, the trial court properly submitted to the jury during the sentencing phase of the trial the aggravating circumstances as to whether the bystander was murdered for "pecuniary gain" although the evidence showed that the money had already been obtained from the storekeeper at the time the bystander was shot, since the murder of the bystander was apparently committed in an effort to eliminate a witness to the robbery, and

the jury could find that both murders were committed for the purpose of permitting the defendants to enjoy pecuniary gain. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Subdivision (e)(3) Refers to Acts Prior to Present Murder Charge. — The "previously convicted" language used by the legislature in subdivision (e)(3) of this section refers to criminal activity conducted prior to the events out of which the charge of murder arose. To decide otherwise would lead to unnecessary duplication within the statute, for subdivision (e)(5) enumerates those felonies which occur simultaneously with the capital felony which the legislature deems worthy of consideration by the jury. It would be improper, therefore, to instruct the jury that this subdivision encompassed conduct which occurred contemporaneously with or after the capital felony with which the defendant is charged. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Subdivision (e)(3) Instruction Proper. — It would be improper to instruct the jury upon the factor enumerated in subdivision (e)(3) of this section when there is no evidence which tends to show a felony conviction. Also, the felony for which the defendant has been convicted must be one involving threat or use of violence to the person. It cannot, under this provision, be a crime against property. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(3) requires that there be evidence that: (1) defendant had been convicted of a felony, (2) the felony for which he was convicted involved the "use or threat of violence to the person," and (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. If there is no such evidence, it would be improper for the court to instruct the jury on this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Subdivision (e)(4) Instruction Proper. — Subdivision (e)(4) on its face is ambiguous, but it must be construed properly so that instructions on the aggravating circumstances will only be given the jury in appropriate cases. In a broad sense any murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest. It is not accurate to say, however, that in every case this "purpose" motivates the killing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivisions (e)(5) and (e)(3) Compared. — Subdivision (e)(5) of this section differs from subdivision (e)(3) in that it guides the jury's deliberation upon criminal conduct of the defendant which takes place "while" or during the same transaction as the one in which the capital felony occurs, whereas subdivision (e)(3) deals with prior conduct. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Instruction on the provision of subdivision (e)(5) is appropriate only when the defendant is convicted for first-degree murder upon the theory of premeditation and deliberation. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(9) Not Applicable to Every Homicide. — While every murder is, at least arguably, heinous, atrocious, and cruel, subdivision (e)(9) is not intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(9) Limited to Acts during Capital Felony. — Limiting application of subdivision (e)(9) of this section to acts done to the victim during the commission of the capital felony itself is an appropriate construction of the language of this provision. Under this construction, subdivision (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Propriety of Instruction Under Subdivision (e)(9). — The trial court properly submitted to the jury the aggravating circumstances as to whether the first-degree murder of a storekeeper was "especially heinous, atrocious or cruel" where the State's evidence showed that the storekeeper, after opening his cash register in response to defendants' demands, begged for his life and that one defendant mercilessly shot him to death. However, the trial court erred in submitting the aggravating circumstance as to whether the death of an innocent bystander was "especially heinous, atrocious or cruel" where the State's evidence showed that one defendant, as he was running from the store, shot and killed the bystander who had pulled up to purchase gas, there was no unusual infliction of pain or suffering on the victim, and the brutality of the killing did not exceed that normally present in a case of first-degree murder. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Test When Aggravating Circumstance Erroneously Submitted. — Whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction is the test which should be applied when one of the aggravating circumstances listed in subsection (e) is erroneously submitted by the court and answered by the jury against the defendants. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Burden on Issue of Mitigating Circumstances. — The burden of persuading the jury on the issue of the existence of any mitigating

circumstance is upon the defendant and the standard of proof is by a preponderance of the evidence. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Defendant Entitled to Instruction on Mitigating Circumstance. — Where, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Motion for Listing of Possible Mitigating Circumstances. — If, in a capital case, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, the trial judge must put such circumstances on the written list. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Where, in a capital case, there are a number of things including good character, which a defendant contends the jury should consider in mitigation, in order to insure that the trial judge mentions these to the jury in his instructions the defendant must file a timely request. Otherwise, failure of the court to mention any particular item as a possible mitigating factor will not be held for error so long as the trial judge instructs that the jury may consider any circumstances which it finds to have mitigating value pursuant to subdivision (f)(9). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The legislature intended that all mitigating circumstances, both those expressly mentioned in this statute and others which might be submitted under subdivision (f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing. Where, however, defendant makes no specific request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury and, likewise, makes no timely request to include defendant's good character as a mitigating circumstance, the actions of the trial judge in failing to do these things are not erroneous. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Contention of Good Character Not Encompassed by Subdivision (f)(1). — The mitigating circumstance in a capital case which refers to a defendant's lack of "significant history of prior criminal activity" does not encompass a contention regarding defendant's good character, since good character imports more than simply the absence of criminal convictions. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Criminal Record Admissible to Negate Evidence Under Subdivision (f)(1). — Portions of defendant's criminal record which were read to the jury during the sentencing phase of a first-degree murder case were relevant and competent to negate evidence that defendant had no significant history of prior criminal activity which was submitted to the jury on his behalf as a possible mitigating circumstance. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Model Penal Code Test of Mental Capacity Adopted. — The legislature, by enactment of subdivision (f)(6), has determined to depart from the traditional M'Naghten test and to adopt the Model Penal Code test for mental capacity as a mitigating circumstance to be considered on the question of punishment in capital cases. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Subdivision (f)(6) Circumstance Exists. — This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

In a first-degree murder prosecution in which there was evidence from which the jury could have found that, although defendant knew the difference between right and wrong at the time of the killing, he suffered from schizophrenia and that at the time of the killing defendant's schizophrenia had surfaced, defendant would be entitled to a new sentencing hearing where the trial judge, in his instruction, failed to explain the difference between defendant's capacity to know right from wrong, and the impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law within the meaning of subdivision (f)(6) of this section. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Power of Review in Supreme Court. — Read together, subdivisions (d)(1) and (d)(2) empower the Supreme Court of this State to review errors assigned in the trial and sentencing phases. When prejudicial error is found, the court must order a new sentencing hearing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

District Attorney's Reading of Subsec-... (d) to Jury Was Error. — During the ...tencing phase of a bifurcated prosecution for ...rder, it was error for the district attorney to ...d to the jury § 15A-2000(d), relating to the ...iew of judgment and sentence by the ...preme Court. A reference to appellate review ...s no relevance with regard to the jury's task ...weighing any aggravating and mitigating ...cumstances for the purpose of recommending ...sentence. More importantly such reference ...l, in all likelihood, result in the jury's ...ance on the Supreme Court for the ultimate ...ermination of sentence. State v. Jones, 296 ...C. 495, 251 S.E.2d 425 (1979).

...he rule precluding any argument which ...gests to the jurors that they can depend on ...licial or executive review to correct an ...roneous verdict and thereby lessen the jurors' ...ponsibility applies with equal force to a sen-...ce recommendation in a bifurcated trial. ...ate v. Jones, 296 N.C. 495, 251 S.E.2d 425 ...979).

District Attorney's Reference to Parole ...atute Was Error. — In a prosecution for ...urder, during the sentencing phase of a bifur-...ted trial, the district attorney's reference to ...e parole statute was erroneous. Neither the ...ate nor the defendant should be allowed to ...eculate upon the outcome of possible appeals, ...roles, executive commutations or pardons. ...e jury's sentence recommendation should be ...ed solely on their balancing of the ...gravating and mitigating factors before ...em. State v. Jones, 296 N.C. 495, 251 S.E.2d ...5 (1979).

...n the sentencing phase of a bifurcated trial, ...reference to any statutory provision, which ...uld have the effect of minimizing in the ...rors' minds their role in recommending the ...ntence to be imposed, is precluded. The ...tters which a jury may consider in the ...ntencing phase of a bifurcated trial are ...arly set forth in § 15A-2000(e) and (f). State ...Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

...Rules of Evidence Not Altered. — The lan-...age of this section does not alter the usual ...les of evidence or impair the trial judge's power to rule on the admissibility of evidence. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Evidence Unrelated to Defendant Properly Excluded. — Where the evidence offered by the defendant in a capital case and excluded by the trial judge was in no way connected to defendant, his character, his record or the circumstances of the charged offense, it was, therefore, irrelevant and of no probative value as mitigating evidence in the sentencing procedure of defendant's trial, and the trial judge's ruling excluding the evidence did not unduly limit the jury's consideration of mitigating factors in violation of subdivision (f)(9). State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Eyewitness Account of Execution Properly Excluded. — In a capital case, it was not error for the trial judge to refuse to allow the defendant to present during the sentencing phase of the trial, an eyewitness account of a gas chamber execution, since the evidence was in no way connected to defendant, his character, his record or the circumstances of the charged offense. It was totally irrelevant and, therefore, properly excluded by the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Applied in State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980).

Stated in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Carter, 296 N.C. 344, 250 S.E.2d 263 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

§ 15A-2001. Capital offenses; plea of guilty.

Legal Periodicals. — For comment on cap-...l sentencing statute, see 16 Wake Forest L. ...v. 765 (1980).

STATE of North Carolina

v.

Michael Edward PINCH.

No. 43A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Guilford County, Hal Hammer Walker, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Copeland, J., held that: (1) both guilt and sentencing phases of defendant's trial were competently conducted without accompaniment of constitutional defect or prejudicial error; (2) judgments of death were lawfully imposed; and (3) death sentence was not excessive or disproportionate considering premeditated and calloused manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life.

No error.

Exum, J., dissented and filed an opinion.

Carlton, J., concurred and filed an opinion in which Branch, C. J., joined.

1. Jury ⇐108

Prospective jurors were properly excused for cause from capital case after they each stated unequivocally that, even before hearing any evidence in case, they could not under any circumstances impose death penalty upon defendant.

2. Jury ⇐108

Prospective juror's statement that she did not think she could impose death penalty in capital case under any circumstances constituted an expression of a sufficient refusal to follow the law, that of capital punishment, to warrant excusal for cause.

3. Constitutional Law ⇐267

Jury ⇐33(2.1)

Excusal of jurors from capital case for cause due to their stated opposition to the death penalty did not deprive defendant of his constitutional rights to trial by a jury representing a cross section of the community or to due process of law. U.S.C.A. Const.Amends. 5, 6, 14.

4. Criminal Law ⇐717

District attorney's statement in final argument that defense of intoxication to charge of first-degree murder required intoxication to such a degree as to render defendant utterly and totally incapable of forming intent to kill and to carry out intent correctly conveyed substance of law of intoxication to jury.

5. Criminal Law ⇐720(9)

District attorney's remarks in closing argument with respect to intoxication defense to charge of first-degree murder, although colorful in terminology, were compatible with evidence in case.

6. Criminal Law ⇐720(9)

District attorney was authorized to argue to jury that facts did not support a credible defense of intoxication to charge of first-degree murder.

7. Criminal Law ⇐778(5)

In prosecution for first-degree murder, trial court's instructions upon intoxication defense were entirely correct, and did not shift burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation.

8. Criminal Law ⇐666½

A prosecutor has an implicit duty not to obstruct defense attempts to conduct interviews with any witnesses.

9. Criminal Law ⇐1168(2)

Reversal for a prosecutor's obstruction of defense attempts to conduct interviews with witnesses is only warranted when it is clearly demonstrated that prosecutor affirmatively instructed a witness not to cooperate with defense.

10. Criminal Law ⇐1168(2)

In absence of anything in record to substantiate defendant's claim of prosecutorial misbehavior in refusing to allow State's eyewitnesses to be interviewed by a medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense, reversal was not warranted.

11. Criminal Law ⇐1168(2)

Where there was no evidence tending to show that defense counsel actually approached State's witnesses for stated purpose of arranging interviews with a medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense only to be rejected on account of district attorney's prior, direct instructions to witnesses not to cooperate with defense, prosecutorial misbehavior warranting reversal was not demonstrated.

12. Criminal Law ⇐666½

Where bare summary of proceedings held by trial court on defendant's motion for an order directing district attorney to make State's eyewitnesses available for interviews with medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense made it plain that witnesses themselves refused to talk with defense expert on advice of their own individual attorneys, trial court did not err in denying motion.

13. Criminal Law ⇐633(1), 641.12(1)

In view of alternative methods for defendant's medical witness to obtain necessary information from State's eyewitnesses in order to assist in preparation and evaluation of intoxication defense, including attendance at trial and listening to witnesses' testimony or taking notes on testimony or relaying a transcript to expert for his formulation of opinion upon extent of defendant's impairment from intoxication at time of killings, trial court's denial of pretrial motion for order directing district attorney to make eyewitnesses available for interviews with expert did not deprive defendant of effective assistance of counsel or a fair trial.

14. Criminal Law ⇐1153(4)

Scope of cross-examination rests largely within discretion of trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice.

15. Witnesses ⇐268(1)

Defendant's constitutional rights of confrontation and due process were not unlawfully restricted by trial court's sustaining prosecutor's objections to defendant's cross-examination of State's witnesses concerning amount of beer drunk by defendant on night of murders, his level of intoxication and nature of his behavior in light of failure to demonstrate error in trial court's limiting scope of cross-examination.

16. Criminal Law ⇐1170½(1)

Defendant had no cause for complaint on appeal of trial court's sustension of prosecutor's objections to defendant's cross-examination of State's witnesses concerning amount of beer drunk by defendant on night of murders, his level of intoxication, and nature of his behavior where defendant effectively received benefit of evidence sought after in that, in several instances, witnesses actually answered questions of defense counsel despite prosecutor's objections and trial court's sustension thereof, prosecutor did not move to strike answers, and trial court did not admonish jury to disregard them.

17. Homicide ⇐164

Trial court's exclusion on recross-examination of defendant's question to expert medical witness as to whether murder victims were legally intoxicated at time of their deaths was proper in that question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder.

18. Criminal Law ⇐1170(4)

Defendant was not prejudiced by trial court's exclusion on recross-examination of defendant's question to expert medical witness as to whether victims were legally intoxicated at time of their death where witness had already repeatedly stated during his direct, cross and redirect examina-

tions that the blood alcohol levels of both victims indicated their intoxication at death.

19. Criminal Law ⚬=338(1)

Defense counsel's questioning of witness about whether witness was influenced by alcohol he had drunk on night of murders, as to whether witness had ever seen defendant when he was not "high" on drugs or alcohol, and as to whether defendant and a friend were "drunk" when they "mooned" a police officer earlier in evening of murders did not seek to elicit relevant information having a direct bearing upon defendant's intoxication impairment at time he committed murders, and thus trial court's sustension of prosecutor's objections to such questions and its rulings thereon did not improperly hinder defendant's efforts to present intoxication defense.

20. Criminal Law ⚬=464

Trial court's sustension of prosecutor's objections to questions which were not competently framed to elicit witness' opinion about defendant's general intoxication based upon precise legal meaning of that term did not improperly hinder defendant's efforts to present his intoxication defense.

21. Criminal Law ⚬=1166.22(2), 1171.1(3)

In light of defendant's affirmative admissions throughout trial of existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in remarks of either prosecutor or trial court concerning presumption of existence of those very same elements in charges of first-degree murder.

22. Criminal Law ⚬=1166.22(7), 1171.3

Where trial court's and prosecutor's use of presumption of existence of malice and unlawfulness in charges of first-degree murder did not alleviate in any manner State's overall burden of proving existence of every element of first-degree murder beyond a reasonable doubt, there could not possibly be any constitutional transgressions or prejudice in remarks of either prosecutor or trial court concerning such presumption.

23. Stipulations ⚬=14(10)

Illustrative relevancy of photographs depicting appearance of victims' bodies at time of forensic pathologist's examination, which directly corresponded to forensic pathologist's testimony, was not nullified by defendant's "stipulation" as to cause of death.

24. Criminal Law ⚬=438(5)

State's introduction of ten photographs depicting appearance of murder victims' bodies at time of forensic pathologist's examinations was not an introduction of an impermissibly excessive number of photographs under circumstances of case.

25. Criminal Law ⚬=438(7)

Probative force of photographs' depictions of unattractive markings of victims' violent deaths, as seen by examining forensic pathologist, was not outweighed by their tendency to repulse the sensibilities or to arouse the sympathy of the viewer; thus, introduction of photographs into evidence in prosecution for first-degree murder was not error.

26. Criminal Law ⚬=1037.1(1)

Despite absence of objection, State's argument in capital cases is subject to limited appellate review for existence of gross improprieties which make it plain that trial court abused its discretion in failing to correct prejudicial matters ex mero motu.

27. Criminal Law ⚬=720(9)

In view of testimony of eyewitness that defendant had a grin on his face when he shot victims and testimony of police officer that defendant had told him that his only regret about the death of one victim was that he would not be able to kill him again, district attorney's remarks during closing argument about defendant's enjoyment of killings were not improper but were supported by evidence and reasonable inferences therefrom.

28. Criminal Law ⚬=723(5)

District attorney's statements during final argument describing what defendant

must have been thinking as he sat quietly behind bar holding shotgun immediately prior to killings were not so prejudicial that trial court was required to take corrective action even in absence of an objection.

29. Criminal Law ⇐728(5)

Where district attorney's uncomplimentary and disparaging characterization of defendant as an animal who killed for pleasure was entirely warranted by evidence, there was no gross error in characterization requiring trial court to take corrective action even in absence of an objection.

30. Criminal Law ⇐986.1

Scope of argument at sentencing hearing is governed by same general rules that apply to argument during guilt proceedings.

31. Criminal Law ⇐1042

When prosecutorial remarks during sentencing phase of trial were not objected to at trial, alleged impropriety must be glaring or grossly egregious for Supreme Court to determine that trial judge erred in failing to take corrective action sua sponte.

32. Criminal Law ⇐986.1, 1177

Where evidence in capital case reasonably supported conclusion that defendant enjoyed committing killings, district attorney's further extrapolations during sentencing phase about the unusually callous and playful nature of defendant's murderous acts were legitimate under evidence and were not extreme or prejudicial per se.

33. Criminal Law ⇐986.2(1)

Circumstances of offense and defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation in sentencing; however, ultimate issue concerning admissibility of such evidence must still be decided by presiding trial judge, and his decision is guided by usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.

34. Criminal Law ⇐986.2(1)

Evidentiary flexibility is encouraged in serious and individualized process of life or death sentencing.

35. Criminal Law ⇐986.2(3)

As in any proceeding, evidence offered at sentencing must be pertinent and dependable and, if it passes such test in first instance, it should not ordinarily be excluded. G.S. § 15A-2000(a)(3).

36. Criminal Law ⇐996(1.1)

New sentencing hearing in capital case should not be ordered by Supreme Court for trial judge's exclusion of evidence at penalty phase unless defendant demonstrates existence of patent, prejudicial error. G.S. § 15A-2000.

37. Criminal Law ⇐986.2(3)

In light of fact that there was substantial evidence of defendant's regrets for killings already in evidence, it was not error for trial court to exclude upon objection further testimony upon same subject by witness.

38. Criminal Law ⇐1177

Trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial was not reversible error in that letters added little to in-court testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it.

39. Criminal Law ⇐986.2(3)

Although defendant's habits regarding alcohol and drug misuse were relevant mitigating factors for jury's consideration in capital case, precise details of his particular overdoses were not pertinent to his sentencing; thus, trial court did not err in refusing to permit witness to testify about circumstances of defendant's various hospitalizations for drug overdoses. G.S. § 15A-2000(a)(3).

40. Criminal Law ⇐986.2(3)

Trial court correctly sustained prosecutor's objection at sentencing hearing to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant would be able to adjust to life in prison

where such an opinion would have concerned a matter totally irrelevant to sentencing of defendant convicted of two first-degree murders since, regardless of his ability to adjust to prison life, defendant was already subject to mandatory imposition of life imprisonment. G.S. §§ 14-17, 15A-2000(a)(1), 15A-2002.

41. Criminal Law ⇐469

Even assuming that defendant's ability to cope in prison had some slight relevance to his sentencing following conviction of two first-degree murders, psychiatrist's opinion about whether defendant would be able to adjust to life in prison was properly excluded where there was an insufficient foundation in record for a conclusion that he was better qualified to have an opinion on this subject than the jury. G.S. § 15A-2000.

42. Criminal Law ⇐473

Where psychiatrist admitted that he could not render an opinion about defendant's blood alcohol level at time of shootings within a reasonable degree of medical certainty, evidence, although relevant, was unreliable and lacked probative value, and thus was properly excluded at sentencing hearing. G.S. § 15A-2000.

43. Witnesses ⇐266

General rule that truthfulness of any aspect of any witness's testimony may be attacked on cross-examination applies to all trial proceedings, including both guilt and sentencing phases in capital cases.

44. Criminal Law ⇐1171.8(2)

Defendant's ability to afford alcohol and drugs bore upon credibility of his self-serving statements about their constant use, introduced as mitigating factors in sentencing phase of capital case, so that prosecutor's repeated questioning of defendant as to specific source of money to buy all the beer and drugs he allegedly consumed did not constitute prejudicial error despite defendant's contention that the persistent questioning about money improperly suggested to jury that he must have committed other criminal offenses to support his habits.

45. Witnesses ⇐280, 282½

Persistent nature of prosecutor's questioning of defendant during sentencing phase of capital case as to source of money used to buy all the beer and drugs which defendant said he had taken every day for five years was not abusive in light of defendant's evasive and unresponsive answers.

46. Witnesses ⇐277(2)

Scope and fairness of cross-examination of defendant during sentencing phase of capital case was a matter left to sole discretion of trial judge, and prosecutor had a right to sift or press defendant in order to get a direct and clear response to his questions as to source of money used to buy all the beer and drugs which defendant said he had taken every day for five years.

47. Criminal Law ⇐730(3)

Although defendant's objection to prosecutor's inferential inquiry during sentencing phase of capital case as to whether stealing was specific source of money used to buy all the beer and drugs which defendant said he had taken every day for five years was well taken, in that question amounted to speculative insinuation of prior criminal conduct with no ascertainable good-faith factual basis, trial court's prompt sustension of defendant's objection to disapproved question sufficiently averted any prejudice to defendant in light of fact that it was a single impropriety.

48. Criminal Law ⇐1171.1(2)

Prosecutorial statements are not placed in an isolated vacuum on appeal; fair consideration must be given to context in which remarks were made and to overall factual circumstances to which they referred.

49. Criminal Law ⇐700

Prosecutor of a capital case has a duty to pursue ardently the goal of persuading jury that facts in evidence warrant imposition of ultimate penalty. G.S. § 15A-2000(a)(4).

50. Criminal Law ⇐724(2)

District attorney's comment during jury argument in penalty phase of capital case that defendant was "not Jack the Ripper yet" did not overstep bounds of permissible argument where comment was tempered by prior explanation to jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. G.S. § 15A-2000.

51. Criminal Law ⇐713

District attorney's expressions during jury argument in penalty phase of capital case concerning his belief in death penalty and propriety of imposition in instant case did not overstep bounds of permissible argument in view of fact that such expressions had to be weighed with his frequent reminders to jury that it would have to determine what appropriate punishment should be. G.S. § 15A-2000.

52. Criminal Law ⇐724(2)

District attorney's characterization during jury argument in sentencing phase of capital case of defendant's mind as a "cesspool" could not be deemed unfair in light of defendant's own admissions that he killed victims intentionally and maliciously simply because one of victims had wrongfully worn insignia or emblem of defendant's motorcycle gang sometime in the past. G.S. § 15A-2000.

53. Criminal Law ⇐723(1)

District attorney's statement to jury during sentencing phase of capital case that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed murders, although disapproved, was not an inflammatory invitation for jury to act like a lynch mob in light of fact that district attorney noted that law did not work that way. G.S. § 15A-2000.

54. Criminal Law ⇐1171.1(6)

District attorney's complaints during jury argument in sentencing phase of capital case about how he could not bring in family members to testify about "trials and travails" of murder victims' lives, in contrast to all of evidence about defendant's family and personal history received in mitigation, contained nothing inherently prejudicial since district attorney was merely reminding jury that, although it did not know much about him, it should also carefully consider value of victim's life in making its life or death decision about defendant. G.S. § 15A-2000.

55. Criminal Law ⇐796

Common sense, fundamental fairness, and judicial economy dictated that any reasonable doubt concerning submission of a statutory or requested mitigating factor be resolved in defendant's favor to insure the accomplishment of complete justice at first sentencing hearing. G.S. § 15A-2000.

56. Criminal Law ⇐1172.9

Same standard of appellate review continues to apply whether trial court commits error at guilt phase or penalty phase; thus, a new sentencing hearing will not be ordered for erroneous failure to submit a mitigating circumstance if that error was harmless beyond a reasonable doubt. G.S. § 15A-1443(b).

57. Criminal Law ⇐1177

Defendant demonstrates reversible error in trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes that particular factor was one which jury could have reasonably deemed to have mitigating value, that there was sufficient evidence of existence of factor, and that, considering case as a whole, exclusion of factor from jury's consideration resulted in ascertainable prejudice to defendant. G.S. § 15A-2000.

58. Criminal Law ⇐986.2(1)

Mentality of a defendant is generally relevant to sentencing and it can, with supporting evidence, be properly considered in mitigation of a capital felony. G.S. § 15A-2000.

59. Homicide ⇐311

Although fact that defendant had scored 66 on an intelligence test unquestion-

ably related to defendant's mentality, and defendant would have been entitled to an instruction about specific intelligence quotient if he had tendered properly worded request therefor, defendant's evidence, including testimony of psychiatrist that defendant's other tests indicated his I.Q. was probably a little higher than 66 and fell at least into low-normal range of intelligence, did not autherize submission of instruction to jury during sentencing phase of capital case as to his "relatively low mentality." G.S. § 15A-2000.

60. Homicide ⇐341

Trial court's omission, during sentencing phase of capital case, of defendant's requested instruction on his "relatively low mentality" was not prejudicial, despite psychiatrist's testimony that defendant's intelligence quotient fell at least into low-normal range of intelligence, since jury could have elected to consider such factor under trial court's instruction permitting jury to evaluate any other circumstances arising from evidence which it deemed to have mitigating value. G.S. § 15A-2000(f)(9).

61. Homicide ⇐311

Psychiatrist's testimony during sentencing phase of capital case that defendant had "psychological problems" and was "a very passive person that exhibits some chronic depression in terms of how he functions in life," but that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence" did not support submission upon trial court's own motion of statutory mitigating circumstances that defendant committed murders while he was "under the influence of a mental or emotional disturbance." G.S. § 15A-2000(f)(2).

62. Homicide ⇐341

Trial court's failure to submit sua sponte, during sentencing phase, statutory mitigating circumstances that defendant committed murders while he was "under the influence of a mental or emotional disturbance" did not constitute prejudicial error since jury could have elected to consider such factor pursuant to trial court's instruction upon open-ended provision of capital punishment statute permitting jury to evaluate any other circumstances arising from evidence which it deemed to have mitigating value. G.S. § 15A-2000(f)(2, 9).

63. Criminal Law ⇐161

Submission of each of two killings as an aggravating circumstance for the other under the "course of conduct" provision of capital punishment statute at initial sentencing hearing jointly held on dual capital convictions did not violate protection against double jeopardy. U.S.C.A.Const. Amends. 5, 14; G.S. § 15A-2000(e)(11).

64. Criminal Law ⇐161

Thrust of concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for same offense nor may a defendant receive multiple punishment for same offense. U.S.C.A.Const.Amends. 5, 14.

65. Criminal Law ⇐163

Principle of double jeopardy does not prevent prosecution from relying, at sentencing phase of capital case, upon a related course of criminal conduct by defendant as an aggravating factor to enhance punishment of defendant for another distinct offense, and this is so irrespective of whether defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. U.S.C.A. Const.Amends. 5, 14; G.S. § 15A-2000.

66. Criminal Law ⇐796

Trial court's direction to jury in sentencing phase of capital case that it need not specify which mitigating circumstances on written list it found, while not the better practice, did not constitute error. G.S. § 15A-2000.

67. Criminal Law ⇐884

Jury may not arbitrarily or capriciously impose or reject a sentence of death; instead, jury may only exercise guided discretion in making underlying findings required

for a recommendation of death penalty within carefully defined set of statutory criteria that allows them to take into account the nature of the crime and the character of the accused. G.S. § 15A-2000(b,-c).

68. Criminal Law ⟹796

Jury was correctly informed during sentencing phase of capital case that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under capital punishment statute. G.S. § 15A-2000(c).

69. Homicide ⟹311

Submission to jury in sentencing phase of capital case of aggravating circumstance that murders were especially heinous, atrocious, or cruel is appropriate only when there is evidence of excessive brutality beyond that normally present in any killing, or when facts as a whole portray commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to victim. G.S. § 15A-2000(e)(9).

70. Homicide ⟹354

Evidence of defendant's careful execution of deliberate and premeditated plan for murder and that deaths of both unsuspecting victims were not instantaneous and involved infliction of unusual physical or psychological torture was sufficient to support finding of jury that murders were especially despicable and wanton under capital punishment statute. G.S. § 15A-2000(e)(9).

71. Criminal Law ⟹1206(1)

Death sentence review mandated by capital punishment statute provides a sufficient constitutional safeguard against unconstitutional imposition of cruel and unusual punishment. G.S. § 15A-2000(d)(2).

72. Criminal Law ⟹1206(2)

Intended ultimate emphasis of proportionality review of a death sentence under capital punishment statute is upon independent consideration of individual defendant and nature of crime or crimes which he has committed. G.S. § 15A-2000(d)(2).

73. Criminal Law ⟹1206(1)

Bifurcated trial proceedings of capital punishment statute, in which same jury determines both guilt and punishment issues, and resultant use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to death penalty, are constitutional. G.S. § 15A-2000.

74. Criminal Law ⟹1206(1)

Submission in appropriate cases, of sufficiently clear statutory aggravating circumstance of capital punishment statute that capital felony is "especially heinous, atrocious, or cruel" is constitutional. G.S. § 15A-2000(e)(9).

75. Criminal Law ⟹1206(1)

Placing burden on defendant, in capital case, to persuade jury, by a preponderance of the evidence, that a particular mitigating circumstance exists is constitutional. G.S. § 15A-2000.

In relevant part, the evidence for the State tended to show the following. On 16 October 1979, defendant, a nineteen year old white male, was walking on Merritt Drive in Greensboro with his friend Jimmy Eanes when he happened to meet Freddie Pachaco. Defendant did not like Pachaco because he had been friendly with a girl defendant liked and had, without proper entitlement, worn the personal insignia ("colors") of a motorcycle gang on his jacket. On this occasion, defendant told Eanes that he "hated that punk" (Pachaco) and wanted to fight him right then and there. This did not occur, however, because Pachaco was conciliatory and offered defendant some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Sometime later, Pachaco asked defendant outright whether he was "after" him. Defendant replied that he was not and further said that "if [he] was going to kick [Pachaco's] ass, [he] would have already done it."

On the following day starting at about noon, several people began to congregate at the trailer, where defendant apparently lived, to drink beer and listen to music.

The merrymakers included Jimmy Eanes, Shawn Feeney, Keith Way, Billy Stanley and Leslie Hearl (who later married Stanley before trial). Pachaco and his friend Tommy Ausley also unexpectedly joined the party and bought two cases of beer. Everybody was calm and pleasant and seemed to be having a good time. However, defendant told several of his friends during the course of the party that he disliked, or didn't have "much use for", Pachaco and said he would like to kill him. Later in the evening, defendant took Feeney's shotgun and fired it at the clothesline three times. A deputy sheriff came to the trailer to investigate the disturbance, but he soon departed after talking to defendant.

Upon defendant's suggestion, everyone decided to leave the trailer and go to the Stroker Motorcycle Clubhouse, which was located in some woods near Wendover Avenue in Greensboro. Defendant had reasoned that they could make as much noise as they wanted to out there and get more beer besides. [It was approximately 10:00 p. m.] While everyone prepared to move, defendant quickly slipped out to a nearby trailer where he borrowed a shotgun. He returned with the gun and told Eanes to ride with Pachaco and Ausley to make sure they got to the clubhouse. The entire party then proceeded to the rendezvous in various vehicles, caravan style. En route, defendant retained the shotgun and told his companions that he was going to kill Pachaco and Ausley.

When the group arrived at the clubhouse, defendant opened the door while he continued to hold the shotgun. Once inside, the members of the party played games, drank beer and listened to music. Billy Stanley and Leslie Hearl left the company and went into an adjacent room to have sexual intercourse. While everyone else engaged in these various recreational activities, defendant sat silently behind the bar with the shotgun in his lap. Sometime later, defendant gave his knife to Eanes and instructed him to cut Pachaco's jugular vein and promised to back him up with the shotgun. Eanes attacked Pachaco but only succeeded in cutting him on the throat. Pachaco became emotional at this point but did not fight back. Ausley attempted to help Pachaco and was confronted by Eanes who threw a chair at him. At this point in the evening's events, the testimony of the eyewitnesses differed somewhat. Nevertheless, the overall weight of that testimony combined with the evidence of defendant's own pre-trial statements to law officers tended to show the following occurrences.

Immediately after the throat-slashing incident between Eanes and Pachaco, defendant raised the shotgun and pointed it at Pachaco. Pachaco told defendant, "I will go down laughing." Without saying a word, defendant shot him in the chest. Defendant then turned toward Ausley, whom he had never seen before that day. Ausley pleaded with defendant and said, "don't shoot me," "[n]o, not me." Defendant shot him anyway. Pachaco was still moaning. Defendant walked over to where he lay helpless on the floor and shot him again at point blank range just below the heart. Pachaco and Ausley died from the gunshot wounds. During the shootings, defendant had "a sort of grin" on his face.

Defendant, apparently with a full realization of what he had just done, walked outside to the porch of the clubhouse and told Feeney and Way that he had "blown away" two dudes. He then directed everyone to help him dispose of the bodies. The bodies were placed in an automobile which Eanes drove to Causey Street and abandoned in a ditch. Defendant did not return to his residence; instead, he went home with Stanley and Hearl. On the way, he told Stanley that he had killed Pachaco and Ausley because he "didn't have any use for people like that." Defendant was not upset and seemed to have no regrets about the murders. He went to sleep. The next day, Stanley and Hearl returned to the clubhouse at defendant's behest and cleaned up the blood on the floor. Another member of the Stroker motorcycle gang painted the steps to conceal bloodstains.

The bloody car and bodies of Pachaco and Ausley were discovered in the early morn-

ing hours of 19 October 1979. Defendant took a bus to California where he was subsequently arrested on 28 January 1980. Defendant waived extradition on 4 February 1980 and was picked up by two officers of the Greensboro Police Department two days later. During the flight back to North Carolina, defendant made a full confession to the murders. [He was advised of his constitutional rights and executed the required waiver form.]

Defendant presented no independent evidence during the guilt determination phase of the proceedings. The defense did, however, elicit evidence during cross-examination of prosecution witnesses tending to show that defendant was drunk when the killings occurred.

The jury found defendant guilty of two counts of first-degree murder. The State relied on its evidence presented during the guilt phase of the trial and did not offer additional evidence during the sentencing hearing. The State did, however, argue that the murders were especially heinous because defendant committed them for sport and amusement. In addition, the State contended that the killing of the eighteen-year-old Ausley was particularly despicable because defendant had shot him in cold blood as he begged and pleaded for his life. On the other hand, defendant offered much evidence in mitigation of his criminal acts, including the following facts: his youth; the divorce of his parents during his childhood; his chronic drug and alcohol abuse since the age of twelve; his leaving home at the age of thirteen (from that time on, he had lived on his own); his low intelligence; his psychological problems of depression, conflicts in relationships and poor judgment; and his feelings of remorse over the killing of Ausley. In its instructions upon the sentencing phase of the case, the court submitted two aggravating circumstances for the jury's consideration: (1) the murders were especially heinous, atrocious or cruel, G.S. 15A-2000(e)(9); and (2) each murder was part of a course of conduct in which defendant committed a crime of violence against another person, G.S. 15A-2000(e)(11). The court also submitted ten mitigating circumstances to the jury. The jury subsequently found one or more of the mitigating factors but also unanimously found them to be outweighed by the foregoing aggravating circumstances beyond a reasonable doubt. The jury therefore recommended imposition of the death penalty for both murders, and the court so ordered.

Additional facts, which become relevant to defendant's specific assignments of error, shall be incorporated into the opinion.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Joan H. Byers, Raleigh, for the State.

Appellate Defender Adam Stein and Ann B. Peterson, Raleigh, pro hac vice for defendant-appellant.

COPELAND, Justice.

Defendant brings forward many assignments of error which he contends require a new trial of these crimes, or a new sentencing hearing, or both. We disagree and affirm the sentences of death imposed upon the jury's recommendations.

At the outset, we must note that defendant's appellate counsel filed a brief which is 109 pages long.[1] A defendant who stands convicted in a capital case is, of course, entitled to effective and diligent advocacy in the presentation of his appeal. However, defendant's brief seems unduly lengthy and quite repetitious. Common sense dictates that there must be an end to what can be said in behalf of any cause and that good judgment and prudence should prevail in the legal art of brief-writing.[2] Indeed, the volume of a brief should always be an accurate reflection of the substance of the arguments presented therein. We therefore exhort practitioners before this Court to seek excellence first, not excessiveness, in the preparation of briefs and remind them that the ability to be direct and concise is a

1. The State was understandably forced to respond in like kind with a 90 page brief.

2. Our Rules of Appellate Procedure do not set a formal limit upon the length of a brief.

formidable weapon in the arsenal of appellate advocacy. We now direct our attention to the merits of the case and address defendant's arguments in the order in which they appear in his brief.

GUILT PHASE: I—V

I.

Forty-two veniremen were examined over a period of five days before a jury of twelve was impanelled to try this case. During the selection process, the trial court excused eight prospective jurors for cause due to their stated opposition to the death penalty. Defendant contends that the trial court's action deprived him of his constitutional rights of due process and trial by jury. The record plainly refutes this argument.

[1, 2] The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. . . ." *Witherspoon v. Illinois*, 391 U.S. 510, 522 at n. 21, 88 S.Ct. 1770, 1777 at n. 21, 20 L.Ed.2d 776, 785 at n. 21 (1968); *see State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). It is unmistakably clear that seven of the eight potential jurors were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant. *State v. Oliver*, 302 N.C. 28, 39–40, 274 S.E.2d 183, 191 (1981). It is equally clear that the remaining juror, Mary Neal, was also correctly removed from the panel when, after some initial equivocation, she finally stated that she did not "believe" that she could impose the death penalty regardless of the evidence. The court thereupon asked her, "Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?" Ms. Neal replied, "No, I just don't think so." Considering her answers contextually, we find that Ms. Neal expressed a sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. *State v. Avery*, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980); *see State v. Taylor*, 304 N.C. 249, 266, 283 S.E.2d 761, 773 (1981).

[3] The excuse of these jurors for cause did not deprive defendant of his constitutional rights to trial by a jury representing a cross-section of the community or due process of law. *State v. Avery, supra*, 299 N.C. at 137–38, 261 S.E.2d at 810; *State v. Cherry, supra*, 298 N.C. at 106, 257 S.E.2d at 564. We would add, moreover, that the need for their excuse was manifest. It would have amounted to an absurdity and a mockery of our law to have permitted these jurors to sit on a case where imposition of the death penalty was an available sentencing option. For, if capital cases could be tried by juries which included persons *firmly* opposed to the maximum prescribed penalty sought by the State, the separate sentencing hearing mandated by G.S. 15A-2000 would almost certainly become a futile and meaningless exercise, contrary to the expressed will of our citizenry in the enactment of capital punishment legislation.

II.

At trial, defendant contested the premeditation and deliberation elements of first degree murder primarily through the presentation of an intoxication defense. Defendant believes that he was unconstitutionally deprived of the substance of this defense by certain improper comments of the prosecutor and a series of erroneous rulings by the trial court.[3] We are not so persuaded and overrule these assignments of error.

3. This "single" argument in defendant's brief really addresses four distinct issues (howbeit with a common denominator: the intoxication defense). Clarity of review is enhanced by the separate statement of each question and its corresponding argument. *See* N.C. Rules of Appellate Procedure, Rule 28(b)(3) (Revised Rule 28(b)(5) (Supp. 1981)).

[4-6] (a) In his closing argument to the jury, the district attorney stated, in pertinent part, the following:

> [E]ven if you want to conclude that Michael Pinch was drunk because he said in the statement sometime that he was, he's still guilty because drunkenness is no defense. You have to be so drunk as to be utterly and totally incapable, unable to form the intent to kill and to carry that out; so drunk as to be unable, incapable of understanding the nature and consequence of your act. That is not present here. There is no way you can conclude that anybody was intoxicated to that extent—not on these facts.
>
> . . . .
>
> You can't find it in your conscience and mind, your heart to dignify what happened out there and impartially excuse it on voluntary intoxication. It is not present on this evidence. I suggest to you that there is not even ample evidence to find that he was intoxicated or drunk. . . . No drugs in this case. Beer. Just beer. You just—you can't let him sell that to you. It is not there. It didn't happen. Nobody could have been intoxicated to the extent that the law requires and do what he did in the manner he did it. There just simply—it is offensive to reason and common sense. It stinks to high heaven. (Record at 241, 250).

We can perceive no error in this. Contrary to defendant's assertions, the district attorney correctly conveyed the substance of the law of intoxication to the jury. *See State v. Goodman,* 298 N.C. 1, 12–14, 257 S.E.2d 569, 578–79 (1979). In addition, although some of the foregoing comments were colorful in terminology, we find that as a whole the remarks were compatible with the evidence in the case and that the district attorney was certainly authorized to argue to the jury that the facts did not support a credible defense of intoxication.[4] *See State v. Noell,* 284 N.C. 670, 202 S.E.2d 750 (1974), *death sentence vacated,* 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1205 (1976).

[7] (b) We likewise believe that the trial court's instructions upon the intoxication defense were entirely correct. The record shows that the able judge carefully explained the law in every respect in accordance with the decisions of this Court. *See State v. Propst,* 274 N.C. 62, 161 S.E.2d 560 (1968); N.C.P.I.—Crim. 305.10 (1970). *See also* 4 Strong's N.C. Index 3d, Criminal Law § 6 (1976). We also reject defendant's argument that the judge improperly shifted the burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation. Viewed as a whole, the judge's charge was not reasonably susceptible of such an erroneous interpretation.

[8, 9] (c) Defendant contends that the trial court erred in denying his pre-trial motion for an order directing the district attorney to make the State's eyewitnesses "available" for interviews with a medical expert who had been appointed to assist in the preparation and evaluation of an intoxication defense. It should be recognized at once that nothing in our statutory discovery provisions would require *the State to compel* its witnesses to submit to any form of interview or questioning by the defense prior to trial; in fact, the State does not even have to afford the defense pre-trial access to a list of its potential witnesses or copies of any statements they may have made. *See* G.S. 15A-903 and 15A-904; *State v. Lake,* 305 N.C. 143, 286 S.E.2d 541 (1982); *State v. Abernathy,* 295 N.C. 147, 244 S.E.2d 373 (1978). Nevertheless, it is true that a prosecutor has an implicit duty not to

4. Under this argument heading in the brief, appellate counsel improperly listed several other exceptions to remarks of the district attorney which were unrelated to the intoxication defense. Such exceptions are not pertinent to the precise question stated. *See* Rule 28(b)(3), *supra,* note 3. Five of these exceptions are argued *again* under assignment of error no. 27 which is reviewed in Part V of the opinion, *infra.* With regard to the remaining "irrelevant" exceptions presented here, it sufficies to say that the comments, which were not objected to at trial, did not transcend the permissible bounds of argument in hotly contested cases and certainly did not amount to gross improprieties in any event. *See State v. Lynch,* 300 N.C. 534, 268 S.E.2d 161 (1980); *State v. Johnson,* 298 N.C. 355, 259 S.E.2d 752 (1979).

obstruct defense attempts to conduct interviews with *any* witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Mason*, 295 N.C. 584, 587–88, 248 S.E.2d 241, 244 (1978), *cert. denied*, 440 U.S. 984, 99 S.Ct. 1797, 60 L.Ed.2d 246 (1979); *State v. Covington*, 290 N.C. 313, 343, 226 S.E.2d 629, 649 (1976).

[10-12] This record contains no such showing. The only indication of *possible* prosecutorial misbehavior is the bare allegation of defense counsel in the motion that the district attorney had told him of his specific refusal to allow the interviews in question. We find nothing in the record to substantiate this claim nor any evidence tending to show that defense counsel actually approached the potential witnesses for the stated purpose only to be rejected on account of the district attorney's prior, direct instructions to them against their cooperation. Defendant has therefore failed to present adequate grounds for reversal. *State v. Mason, supra.* In addition, the bare summary of the proceedings held by the court upon the motion make it plain that the *witnesses themselves* refused to talk with the defense expert *on the advice of their own individual attorneys.* Record at 51. Under these circumstances, neither the State nor the trial court had the power to interfere with the attorney-client privileges of the witnesses or to jeopardize their own future defenses.[5] Viewed in this light, it would have been a vain act indeed for the trial court to order the State to provide the defense with something which was, for all practical purposes, completely unavailable.

[13] In this context, the trial court did all that it could reasonably do by initially providing the defense with $1500 in state funds to hire the medical expert. In denying the motion to compel the interviews, the court reminded the defense that the same necessary information could be obtained if the expert attended the trial and listened to the witnesses' actual testimony.[6] If, as it is suggested, the additional cost of the psychiatrist's time to do just that was prohibitive, defense counsel could have taken notes upon the testimony or relayed a transcript to the doctor for his formulation of an opinion upon the extent of defendant's impairment from intoxication at the time of the killings. We conclude that the denial of the motion did not deprive defendant of effective assistance of counsel or a fair trial. *See also State v. Williams (I)*, 304 N.C. 394, 404–06, 284 S.E.2d 437, 445–46 (1981).

[14, 15] (d) We must now consider whether defendant's constitutional rights of confrontation and due process were unlawfully restricted by the trial court's sustension "of the prosecutor's objections to the defendant's cross-examination of the State's witnesses concerning the amount of beer drunk by the defendant, his level of intoxication and the nature of his behavior. . . ." Defendant's Brief at 30. Our review is governed by the well-established rule that the scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice. *State v. Atkins*, 304 N.C. 582, 585, 284 S.E.2d 296, 298 (1981) (and authorities there cited). Defendant has failed to demonstrate error in the trial court's rulings; consequently, we overrule all of the pertinent underlying exceptions listed in defendant's brief.[7]

5. The witnesses sought by the defense to construct its intoxication theory were the persons who were present during the commission of the murders (and participated in the concealment thereof.)

6. It should perhaps be mentioned that the motion for the "pre-trial" interviews was actually filed after the jury selection process had already begun and only three working days before the full trial of the matter actually commenced. [In fact, the trial court heard and denied the motion on the very first day of the trial.]

7. Exceptions nos. 42, 45 and 50 bear no rational relationship to the argument concerning the "impairment" of the intoxication defense. *See* Rule 28(b)(3), *supra*, note 4. We have nonetheless reviewed these exceptions and find that the prosecutor's objections were properly sustained within the trial court's discretion. Ex-

[16] In several instances, the witnesses actually answered the questions of defense counsel despite the prosecutor's objections and the trial court's sustension thereof (exceptions nos. 27, 28, 48A). The prosecutor did not move to strike the answers, and the trial court did not admonish the jury to disregard them. Thus, defendant effectively received the benefit of the evidence sought after, and he has no corresponding cause for complaint on appeal. *State v. Hopkins*, 296 N.C. 673, 252 S.E.2d 755 (1979).

[17, 18] In another instance, defense counsel attempted to ask an expert medical witness on recross-examination whether the *victims* were legally intoxicated at the time of their deaths (exception no. 35). We believe that this question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder. *See* 1 Stansbury's N.C. Evidence § 77, at 234 (Brandis rev. 1973). The relevant issue at trial was whether *defendant* was too intoxicated to form the specific intent to commit murder in the first degree. Obviously, the nature of his criminal acts was not diminished according to the sobriety or drunkenness of the unfortunate victims. Nevertheless, even assuming that this evidence had some degree of relevancy, however slight, it is unquestionably clear that defendant was not prejudiced by its exclusion on *recross*-examination when the doctor had already repeatedly stated during his direct, cross and redirect examinations that the blood alcohol levels of both victims indicated their intoxication at death.

[19, 20] The remaining exceptions argued herein by defendant are equally meritless. Exceptions no. 40 and 41 concerned defense counsel's questioning of the witness Eanes about whether *he* was "influenced by the alcohol [he] had drunk" on the night of the murders. Exception no. 44 related to the overly broad and legally ambiguous question to Eanes about whether he had *ever* seen defendant when he was *not* "*high*" on drugs or alcohol. Exception no. 48 involved a question as to whether defendant and Billy Wayne Stanley were "drunk" *when* they "mooned" an officer earlier in the evening of the murder (at the trailer). The trial court did not abuse its discretion in sustaining the prosecutor's objections to these questions, and its rulings thereon did not improperly hinder defendant's efforts to present his intoxication defense. None of the questions sought to elicit relevant information having a *direct* bearing upon *defendant's* intoxication impairment *at the time he committed the murders*. Moreover, none of the questions were competently framed to elicit a witness's opinion about defendant's general intoxication based upon the precise legal meaning of that term. *See, e.g., State v. Carroll*, 226 N.C. 237, 239–240, 37 S.E.2d 688, 690–91 (1946).

III.

The jury was advised by both the prosecutor, in his closing argument, and the trial court, in its final instructions, that the elements of malice and unlawfulness were implied in an intentional killing with a deadly weapon. Defendant maintains that his constitutional right to trial by jury was violated because the jury was not also simultaneously informed that it was not compelled to infer malice and unlawfulness, as the presumption of their existence was rebuttable. *See, e.g., State v. Hutchins*, 303 N.C. 321, 346, 279 S.E.2d 788, 804 (1981). Upon this record, defendant's position offends reason and is untenable.

[21, 22] The significant and controlling fact in this case is that defendant, through his trial counsel, *conceded* his guilt of the second degree murders of Pachaco and Aus-

ception no. 42 involved a question which was argumentative and irrelevant. Exceptions nos. 45 and 50 involved questions which sought impermissible conclusions from the witnesses about matters which were not within the realm of their personal knowledge. *See* 1 Stansbury's N.C. Evidence § 122, at 384–85 (Brandis rev. 1973).

ley.[8] Defense counsel stated in his closing argument to the jury:

When we started the case in selecting the jury, we told you—and also in opening remarks ... that we were not contesting the fact that this young man over here killed two people intentionally with malice. That's never been at issue in this case. He's guilty of second-degree murder. We've admitted that all along. The State has proved it to you, but they didn't really have to. We admitted that.

....

... [W]e're admitting the intentional killing and the malice involved in this thing....

....

... He's guilty of second-degree murder, two of them. (Record at 226, 236).

In light of defendant's own affirmative admissions of the existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in the remarks of either the prosecutor or the trial court concerning the presumption of the existence of those very same elements in the charges of first degree murder. "The State is not required to prove malice and unlawfulness unless there is some evidence of their non-existence...." *State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981); *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E.2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1976). *See also Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. White*, 300 N.C. 494, 268 S.E.2d 481 (1980). Moreover, it is evident from the record that the use of the presumption did not alleviate in any manner the State's overall burden of proving the existence of *every* element of first degree murder beyond a reasonable doubt. The assignment of error is overruled.

IV.

Dr. John D. Butts, a forensic pathologist, performed the autopsies of the victims and testified at trial about the causes of their deaths. In the course of his testimony, Dr. Butts identified ten photographs as accurately depicting the appearance of the bodies at the time of his examinations. The State then introduced the photographs as exhibits (over defendant's objections). The trial court instructed the jury that it could consider the exhibits only for limited illustrative purposes, not as substantive evidence of guilt. As the jury viewed each photograph, Dr. Butts again identified its subject and explained the nature of the body's appearance as shown. Defendant argues that the introduction of these gruesome photographs and the repetitive testimony connected therewith effectively deprived him of a fair adjudication of his guilt and a fair sentencing hearing. Defendant believes that, since he "readily admitted that he killed both victims with gunshot wounds," there was no legitimate purpose or need for the use of the photographs and that they only served to inflame the passions of the jury to his decided prejudice. We disagree.

[23-25] The record clearly shows that the photographs were properly introduced according to our rules of evidence. *See State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980). The illustrative relevancy of the photographs, which directly corresponded to Dr. Butts' testimony, was not nullified by defendant's "stipulation" as to the cause of the deaths. *See State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982). In addition, the actual number of the photographs of the two bodies was not impermissibly excessive under the circumstances of this case. *See State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979). Finally, the probative force of these depictions of the unattractive markings of the victims' violent deaths (as seen by the medical examiner) was not outweighed by their tendency to repulse the sensibilities, or to arouse the sympathy, of the viewer. *Compare*

8. Defendant only contested his guilt of the more grievous offenses; that of murders in the first degree, with the requisite premeditation and deliberation.

State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969).

V.

[26] Defendant assigns as error the district attorney's numerous references to facts outside the record during his closing argument to the jury during the guilt phase. No objection was interposed at trial to any of the alleged instances of misconduct. Despite trial counsel's laxity, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Smith*, 294 N.C. 365, 377–78, 241 S.E.2d 674, 681–82 (1978) (and authorities there cited). Considering them contextually and according to the evidence in the case, we hold that the statements challenged here were not extreme or grossly improper.

[27–29] First, there was nothing wrong with the district attorney's remarks about defendant's enjoyment of the killings. Such comments were supported by the evidence and the reasonable inferences therefrom. *See State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). For example, Billy Wayne Stanley testified that defendant had a grin on his face when he shot the victims, and Officer Fuller testified that defendant had told him that his only regret about the death of Pachaco was that he would not be able to kill him again. Second, the district attorney's statements describing what defendant must have been thinking as he sat quietly behind the bar holding the shotgun were not so prejudicial that the trial court was required to take corrective action even in the absence of an objection. *See State v. King*, 299 N.C. 707, 711–13, 264 S.E.2d 40, 43–44 (1980). Third, and finally, we perceive no gross error in the following "comparisons" made by the State: "You've got to understand the nature of the animal you're dealing with here. I'm not a zoologist, but I don't know of a single living species on this planet that kills for pleasure. Tigers kill to eat, sharks kill to eat. Michael Pinch kills for pleasure. Think about that." Record at 250. This uncomplimentary and disparaging characterization of defendant was entirely warranted by the evidence. *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979); *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

SENTENCING PHASE: VI–XIX

VI.

[30, 31] Defendant again maintains that the district attorney improperly injected facts outside the record into his jury argument—this time during the sentencing phase of the trial. The scope of argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings; consequently, when the remarks challenged on appeal were not objected to at trial, the alleged impropriety must be glaring or grossly egregious for this Court to determine that the trial judge erred in failing to take corrective action *sua sponte*. *See State v. Johnson*, 298 N.C. 355, 368–69, 259 S.E.2d 752, 760–61 (1979). The prosecutorial expressions attacked in this appeal do not fall within the realm of reversible transgressions.

[32] All three of the exceptions set out in the brief under this assignment of error concern the district attorney's statements that the murders were especially despicable, heinous and cruel because defendant executed the victims for sport, recreation and the amusement of his friends. We have already held in part V of the opinion, *supra*, that the evidence in the case reasonably supported a conclusion that defendant enjoyed committing these crimes. That being so, it is clear that the district attorney's further extrapolations at sentencing about the unusually callous and playful nature of defendant's murderous acts were also legitimate under the evidence and were not extreme or prejudicial *per se*.

VII.

Defendant offered much evidence in mitigation of his acts during the penalty phase. In several instances, however, the trial court excluded certain evidence upon the prosecutor's objections. Defendant argues that the trial court thereby deprived him of due process and the right to be free from cruel and unusual punishment.

[33-36] Defendant's contentions must be examined against the backdrop of our capital punishment statute which provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing *which the court deems* "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. G.S. 15A-2000(a)(3); *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.[9] *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Cherry*, 298 N.C. 86, 98-99, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). *See also State v. Goodman*, 298 N.C. 1, 30-31, 257 S.E.2d 569, 588 (1979). Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error. No such showing has been made here.

Specifically, defendant argues that the trial court's sustention of various objections by the prosecutor thwarted his attempts to inform the jury about his "growing awareness of the uselessness of his life up to that point, the pain he caused others, a growing sense of maturity and feelings of remorse and regret." Defendant's Brief at 53. We find that, although some evidence was indeed excluded, the record as a whole is replete with evidence of these matters, and defendant suffered no prejudice whatsoever from the trial court's rulings.

[37, 38] It is true that the trial court sustained an initial and single objection to defendant's testimony about his current feelings of remorse over Pachaco's death; nevertheless, defendant thereafter proceeded to testify in detail about his change in heart and regret without further objection by the prosecutor. Record at 278-79. In addition, Dr. Royal, a forensic psychiatrist, testified about defendant's expressed remorse over Ausley's death. Record at 285. Since substantial evidence of defendant's regrets had already been received, it was not error for the court to exclude (upon objection) further testimony upon the same subject by the witness Sherry Olivey. In any event, defendant later succeeded in introducing more evidence about his repentant statements since the killings through the testimony of his sister and mother. Record at 289, 291-92. We likewise find no reversible error in the trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial. These letters added little to the *in-court* testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it. Even so, the trial court permitted defendant's mother to read to the jury all of exhibit five and portions of exhibits three

9. This does not mean that the evidentiary rules which normally apply at the guilt phase of the trial should also apply with *equal force* in the sentencing phase. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test in the first instance, it should not ordinarily be excluded. G.S. 15A-2000(a)(3), *supra*; *see Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

and four in which defendant had essentially stated, both in prose and poem, that it hurt him to know that he was capable of taking another's life, that he was living for the future and cleaning up his act, and that he had a mature and sincere desire to fulfill his part in life and society properly. Record at 297–99. The letters totally excluded by the court, exhibits one and two, merely repeated the same things, howbeit using different words or examples, about his remorse and his wish to be a better person. Moreover, these two letters included much material which plainly was not relevant to sentencing, *i.e.*, his apologies to his mother for not having been a better son to her despite her good efforts and his rambling philosophical questionings about why he had turned out to be so bad.

[39] Defendant also maintains that the trial court erred in not permitting Sherry Olivey to testify about *the circumstances of his various hospitalizations* for drug overdoses. We disagree. Ms. Olivey testified that she knew of occasions where defendant had taken a drug overdose and that she had visited him in Cone Memorial Hospital three months after the crimes. Certainly, defendant's *habits* regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. It was enough that the jury was informed by Ms. Olivey that:

> I can honestly say that he [defendant] drank or took something every day that I've known him [two years]. . . . He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that.

Record at 296–97.

[40–42] Defendant finally challenges the trial court's refusal to admit certain expert testimony. These contentions lack merit. The court correctly sustained the prosecutor's objection to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant "would be able to adjust to life in prison." Such an opinion would have concerned a matter totally irrelevant to sentencing. Defendant stood convicted of two first degree murders. *Regardless* of his ability to adjust to prison life, by law, defendant was already subject to the mandatory imposition of life imprisonment for those crimes. See G.S. 14–17; G.S. 15A–2000(a)(1), 15A–2002. The issue to be determined by the jury at the penalty phase was not whether defendant would prove to be a "good" prisoner but whether the overall nature of the murders and defendant's attendant acts warranted imposition of the *maximum* available penalty—death in the gas chamber.[10] The trial court also properly excluded the opinion of another psychiatrist about defendant's blood alcohol levels at the time of the shootings. Clearly, such evidence would have been relevant; however, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of medical certainty, the evidence was unreliable and lacked probative value.

In sum, defendant is not entitled to a new sentencing hearing upon the ground that the foregoing classes of evidence were erroneously restricted or rejected by the trial court.

VIII.

At the penalty phase, defendant testified that he had been drinking alcohol and taking or injecting all kinds of illicit drugs

10. Even assuming that defendant's ability to cope in prison had some slight relevancy to his sentencing, we would still hold that the psychiatrist's opinion was properly excluded because there was an insufficient foundation in the record for a conclusion that he was better qualified to have an opinion on this subject than the jury. There was no evidence specifying the doctor's special experience with the prison environment, and the question posed to him essentially requested nothing more than his speculations about defendant's future prison "performance" based merely upon his observations of defendant's behavior in a mental hospital for three and a half weeks.

since he was fourteen years old. He also stated that he had been consuming approximately twelve beers a day for the three years preceding the murders. Obviously, this testimony tended to bolster defendant's evidence of mitigating circumstances. The prosecutor responded by cross-examining defendant about where he got the money to buy all the beer and drugs which he said he had taken every day for five years. Defendant answered that he had money even though he had not been employed. The prosecutor repeatedly asked defendant to identify the specific source of that money, but defendant only replied, "I just got it." The prosecutor finally asked him, "Who did you steal from?" The trial court sustained defense counsel's immediate objection to the question. Defendant complains that the prosecutor's persistent questioning about the money improperly suggested to the jury that he must have committed other criminal offenses to support his habits. On the whole, we find no prejudicial error.

[43, 44] As a general matter, the truthfulness of any aspect of any witness's testimony may be attacked on cross-examination. *See* 1 Stansbury's N.C. Evidence §§ 39–40 (Brandis rev. 1973). This basic rule applies to all trial proceedings, including both the guilt and sentencing phases in capital cases. Thus, it is clear that the prosecutor could properly attempt to impeach defendant's testimony about the actual *extent* of his destructive habits. Defendant's ability to afford the necessary items certainly bore upon the credibility of his self-serving statements about their constant use.

[45, 46] In addition, the persistent nature of the prosecutor's questioning was not abusive in light of defendant's evasive and unresponsive answers. The scope and fairness of the cross-examination was a matter left to the sole discretion of the trial judge, and the prosecutor had a right to sift or press defendant in order to get a direct and clear response. *See State v. Williams,* 303 N.C. 142, 147, 277 S.E.2d 434, 438 (1981); *State v. Currie,* 293 N.C. 523, 529, 238 S.E.2d 477, 481 (1977).

[47] On the other hand, however, it seems that defendant's objection to the prosecutor's inferential inquiry about the stealing was well taken. The question amounted to a speculative insinuation of prior criminal conduct with no ascertainable good faith *factual* basis. See *State v. Shane,* 304 N.C. 643, 651, 285 S.E.2d 813, 818 n. 3 (1982). Still, it was a *single* impropriety, and this case is, therefore, markedly different from *State v. Phillips,* 240 N.C. 516, 82 S.E.2d 762 (1954), where the prosecutor cross-examined the defendant in detail about *seventeen* unproved accusations of prior misconduct. Thus, we hold that the trial court's prompt sustension of defendant's objection to the disapproved question sufficiently averted any prejudice to defendant. *See State v. Williams, supra,* 303 N.C. at 147, 277 S.E.2d at 438.

IX.

Defendant assigns further error to the district attorney's jury argument during the sentencing phase. We have already overruled several of the same supporting exceptions in part VI of the opinion, *supra,* where we set forth the controlling standard of review of any jury argument which is not objected to at trial. To avoid redundancy, we shall not plow those rows again, instead, we shall limit our review to a consideration of the *additional* exceptions presented here.[11]

[48, 49] Let us begin by saying that prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evi-

11. We are compelled to question appellate counsel's organizational rationale for raising further challenges to the sentencing argument here when, logically, all contentions of this type should have been argued together in the same portion of the brief.

dence warrant imposition of the ultimate penalty. G.S. 15A-2000(a)(4); *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980); *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Westbrook*, 279 N.C. 18, 37, 181 S.E.2d 572, 583 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

[50-54] In this case, it is evident that the district attorney argued for capital punishment of defendant's murder convictions with much vim and vigor. Record at 306-10. Contrary to defendant's assertions, however, we do not believe that the district attorney's zeal caused him to overstep the bounds of permissible argument. Examining his statements in their complete context, we are convinced that he did not say anything which would amount to a gross impropriety. His comment that defendant was "not Jack the Ripper yet" was tempered by the prior explanation to the jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. The district attorney's expressions concerning his belief in the death penalty and the propriety of its imposition in the case must be weighed with his frequent reminders to the jury that *it* would have to determine what the appropriate punishment should be.[12] *Compare State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). The characterization of defendant's mind as a "cesspool" cannot be deemed unfair in light of defendant's own admissions that he killed the victims intentionally and maliciously simply because Pachaco had wrongfully worn the insignia or emblem of a motorcycle gang sometime in the past. The statement to the jury that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed the murders, although disapproved by us, was not an inflammatory invitation for the jury to act like a lynch mob. The district attorney noted that the law did not work that way. His comment was a colorful attempt to emphasize the cruelty and callousness with which defendant killed the victims. Finally, there was nothing inherently prejudicial in the district attorney's complaints about how he could not bring in family members to testify about the "trials and travails" of Pachaco's life, in contrast to all of the evidence about defendant's family and personal history received in mitigation. The district attorney was merely reminding [illegible] jury that, although it did not know much about him, it should also carefully consider the value of the victim's life in making its life or death decision about defendant.

X.—XI.

Defendant tendered in writing the following ten circumstances in mitigation:

1. The defendant has no significant history of prior criminal activity.

2. The capacity of the defendant [illegible] appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

3. The age of the defendant at the time of the crime.

4. The defendant voluntarily admitted his culpability immediately after his arrest and cooperated with police efforts to clarify the evidence in these cases and other pending cases arising out of the incident.

5. The defendant since his incarceration has appreciated the severity and error of his conduct.

6. The defendant since his incarceration has ceased the use of alcohol and drugs and is able to function with more maturity and responsibility.

7. The defendant lacks education and has a relatively low mentality.

12. For example, the district attorney stated:

> I don't know what you will conclude is appropriate. I suggest to you, with all due respect, that the conduct is appropriate to be rewarded with the ultimate sanction that our law provides.
>
> We're all people of great ability and conscience, and I ask you to consider what is appropriate for this act. Consider what is justice for Michael Pinch and for what he [illegible]. Consider the two dead boys that he left in his wake.

8. The environment in which the defendant lived until the time of his arrest was infused with violence and accepted violence as an [sic] problem-solving technique.

9. The defendant's childhood history, background, and record shows no indication of a habitually violent nature.

10. Any other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value. Record at 275.

With the exception of the last portion of number seven regarding defendant's "relatively low mentality," the trial court honored defendant's request and submitted all ten of these mitigating factors to the jury. Defendant argues that the trial court thereby erred in two ways: (1) in failing to submit his low mentality in mitigation as requested and (2) in failing to submit upon its own motion the additional statutory mitigating circumstance of G.S. 15A-2000(f)(2), *i.e.*, that he committed the murders while he was "under the influence of mental or emotional disturbance." We conclude that defendant's contentions cannot be sustained on this record.

This Court has previously established instructive guidelines for the trial judges of our State to follow in the submission of mitigating circumstances, including those which arise upon the evidence in a given capital case as well as those specified in G.S. 15A-2000(f). First, in *State v. Goodman*, we held that, although the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted, the trial court "is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value," especially when the trial court instructs the jury upon the open-ended provision of G.S. 15A-2000(f)(9) and thus does not hinder it from evaluating on its own *anything* of mitigating value. 298 N.C. 1, 33-34, 257 S.E. 569, 589-90 (1979). Second, in *State v. Johnson*, we held that the trial court must include additional factors, which are timely requested by the defendant, on the written list submitted to the jury *if* they are "supported by the evidence, and ... are such that the jury could *reasonably* deem them to have mitigating value...." 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979) (emphasis added). Third, in *State v. Hutchins*, we held that, although the trial court has a fundamental duty to declare and explain the law arising upon the evidence, it is not required to instruct upon a *statutory* mitigating circumstance *sua sponte* unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified factor. 303 N.C. 321, 355-56, 279 S.E. 788, 809 (1981); *see State v. Taylor*, 304 N.C. 249, 277, 283 S.E.2d 761, 779 (1981).

[55, 56] The rules of the foregoing cases are sound and practical, and we therefore exhort our trial judges to adhere to them carefully when presiding over the trial of capital cases. Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the *first* sentencing hearing. Nevertheless, the same standard of appellate review continues to apply whether the trial court commits error at the guilt phase or the penalty phase; thus, a new sentencing hearing will *not* be ordered for the erroneous failure to submit a mitigating circumstance if that error was *harmless beyond a reasonable doubt*. G.S. 15A-1443(b); *see State v. Williams (I)*, 304 N.C. 394, 425-26, 284 S.E.2d 437, 456-57 (1981) (erroneous submission of aggravating circumstance was prejudicial and required new sentencing hearing); *State v. Taylor, supra*, 304 N.C. at 285-88, 283 S.E.2d at 783-85 (erroneous submission of aggravating circumstance was not prejudicial).

[57] The sum of the matter is this—a defendant demonstrates reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes three things: (1)

that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A–2000(*f*)); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. The defendant in the instant case fails this three-prong test for a new sentencing hearing.

[58–60] We first analyze defendant's request for an instruction upon his "relatively low mentality." This factor is not listed in G.S. 15A–2000(*f*); however, our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony. *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979), and part VII of the opinion, *supra*. In this case, a psychiatrist testified that defendant had scored 66 on an intelligence test. This fact unquestionably related to defendant's mentality, and we believe that defendant would have been entitled to an instruction about his specific intelligence quotient *if* he had tendered a properly worded request therefor. *See, e.g., State v. Williams*, 304 N.C. 394, 401, 284 S.E.2d 437, 443 (1981); *State v. Rook*, 304 N.C. 201, 211 n. 1, 283 S.E.2d 732, 739 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). However, we do not believe that defendant's evidence adequately authorized the submission of the instruction he did request which used the terms "relatively low mentality." In this regard, the psychiatrist testified that defendant's "other tests indicated that his I.Q. was probably a little higher than [66] and fell at least into the *low-normal range of intelligence*." Although we are not schooled in the medical art of psychiatry, we think that one would not commonly understand low to normal intelligence to be reasonably synonymous with relatively low mentality. Consequently, we hold that the trial court did not err in refusing to instruct the jury in this respect. In any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate "[a]ny other circumstance or circumstances arising from the evidence which you, the jury deem to have mitigating value." G.S. 15A–2000(*f*)(9).

[61, 62] For similar reasons, we reject defendant's contention that the trial court erred in not instructing upon a statutory mitigating circumstance *sua sponte*. The evidence simply did not support the submission of G.S. 15A–2000(*f*)(2). The psychiatrist testified that defendant had "psychological problems" and was "a very passive person that exhibits *some chronic* depression in terms of how he functions in life." He also stated that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence." On cross-examination, the psychiatrist further explained the results of his examination of defendant as follows:

> I also found no evidence of any thought disorder. I found his memory to be adequate and his perception to be adequate. I found that he was always oriented to the time, place and person. I would classify his depression as *mild* depression. I believe that part of his depression would be caused by the incarceration and facing two charges of murder in the first degree. I did not find any evidence of the type of anger that you normally find in people of these subculture groups.

Record at 263–66 (emphasis added). The evidence did not, in our opinion, sufficiently show that defendant was somehow *under the influence* of a mental or emotional disorder *at the time* he committed the murders. We also have serious doubts as to whether "some" "mild" "chronic depression" qualifies as a bona fide mental or emotional disturbance under our capital punishment statute. *Compare State v. Taylor, supra* (evidence that defendant had "paranoid psychosis"); *State v. Rook, supra* (psychiatrists gave direct opinions that defendant had a mental disorder or illness); *State v. Johnson, supra* (defendant was ill–

agnosed as schizophrenic). Again, even assuming that the trial court should have instructed upon G.S. 15A-2000(f)(2), its failure to do so did not constitute prejudicial error since the jury could have elected to consider this factor pursuant to the trial court's instruction upon G.S. 15A-2000(f)(9).

XII.

The trial court submitted each of the two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11).[13] Defendant argues that this kind of reciprocal aggravation to enhance his punishment for both crimes constituted double jeopardy and deprived him of due process of law.[14] For a precise understanding of the issue raised by defendant, we quote from his brief as follows:

> In summary, the defendant's claim in this case ... is that the prosecution faced with two homicides committed by the same person in the same "course of conduct" must choose between two options. The prosecution may use one of the homicides as an aggravating circumstance under § 15A-2000(e)(11) to support the increased penalty of death for the other. The prosecution may seek a separate conviction for each of the homicides, in which case a death penalty for either must be based on aggravating factors that do not include the other homicide. The double jeopardy clause prohibits the prosecution from using both options, i.e., from obtaining a substantive conviction for a homicide and then using it again as an aggravating circumstance under § 15A-2000(e)(11) to support punishment by death for the other killing. Defendant's Supplemental Brief at 4.

To the contrary, we find no constitutional authority mandating a conclusion by us that the submission of G.S. 15A-2000(e)(11) in aggravation of both murders violated defendant's protection against double jeopardy, and we decline to adopt a position which would prevent the administration and availability of equal justice for equal crimes.[15]

[63] In the instant case, defendant killed two persons at the same place and within minutes of each other. The capital charges were tried together pursuant to defendant's own motion for joinder. The jury found defendant guilty of murder in the first degree, upon the theory of premeditation and deliberation, on both counts. The State was thereupon entitled to seek the death penalty for each murder, and it properly did so. The State sought the death penalty based upon the aggravating circumstances of *both* G.S. 15A-2000(e)(9) and (11). The jury found that these aggravating circumstances outweighed the mitigating beyond a reasonable doubt and recommended the death penalty in each case. There was no constitutional error in the procedure employed.

[64] The cases principally relied upon by defendant are clearly inapposite, and the reasoning of those cases simply cannot be stretched to encompass the imaginative and innovative standard of double jeopardy which defendant seeks to impose at *the initial sentencing hearing jointly held upon dual capital convictions*. For example, both the United States Supreme Court's decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and the decision of this Court in *State v. Silhan*, 302

13. G.S. 15A-2000(e)(11) lists the following factor for the jury's consideration: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons."

14. Defendant's motion to file a supplemental brief on this question was allowed by the Court on 8 March 1982. We shall address defendant's contentions as they are presented in that amplified brief.

15. We reach the same conclusion in another death penalty case filed by our Court today: *State v. Williams (II)*, — N.C. —, 292 S.E.2d 243 (1982). In *Williams (II)*, the defendant was tried separately in two counties for two murders. Each murder was submitted as reciprocal aggravation for the other under G.S. 15A-2000(e)(11) at defendant's separate trials. *See State v. Williams (I)*, 304 N.C. 394, 284 S.E.2d 437 (1981).

N.C. 223, 275 S.E.2d 450 (1981), addressed the double jeopardy implications which arise in the event a new trial or a new sentencing hearing is required in a capital case after the jury has already decided the punishment issue either for or against the defendant. Such is plainly not the situation here, and we need not search out hidden nuances of the double jeopardy clause in order to decide the case before us. It is sufficient to recognize that the thrust of the concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for the same offense nor may a defendant receive multiple punishment for the same offense. *See Bullington v. Missouri, supra; State v. Silhan, supra.*

[65] Regardless of the formula utilized, the jury's *consideration* of a defendant's commission of "other crimes of violence," in making its ultimate penalty recommendation for that defendant's conviction of a related but separate capital offense, is not logically equivalent to the defendant receiving multiple punishment for the same crime. This is especially true where, as here, the prosecution relies on an additional aggravating circumstance which is also subsequently found by the jury. In short, the principle of double jeopardy has not evolved, as defendant argues, to the point that it prevents the prosecution from relying, at the sentencing phase of a capital case, upon a related course of criminal conduct by the defendant as an aggravating factor to enhance the punishment of defendant for another distinct offense, and this is so, irrespective of whether the defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. *See, e.g., State v. Hutchins,* 303 N.C. 321, 347, 279 S.E.2d 788, 804 (1981) (reciprocal aggravation of two first-degree murders under G.S. 15A-2000(e)(11)). *See also State v. Cherry,* 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), *cert. denied,* 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (discussing the use of an underlying felony, which accompanies the commission of a premeditated murder, as an aggravating circumstance under G.S. 15A-2000(e)(5)).

In conclusion, we hold that the enhancement of defendant's penalty on the one hand for Pachaco's murder did not result in an unconstitutional duplication of defendant's penalty on the other hand for Ausley's death, and vice versa, simply because defendant's overall violent conduct was submitted in aggravation on each hand under G.S. 15A-2000(e)(11). It is the very fact that defendant killed two people, and not just one, that aggravates the nature of his crimes, and it was entirely proper for the jury to consider this fact in determining whether defendant should pay the ultimate price for each life he took.

XIII.

[66] Defendant assigns error to the trial court's direction to the jury that it need not specify which mitigating circumstances on the written list it found. This same issue was recently addressed at length in *State v. Rook,* where we stated: "While defendant makes a good argument that it is the better practice, and we agree, to require the jury to specify mitigating factors found and not found for the benefit of this Court in reviewing the appropriateness of the death penalty, we find no such requirement in our statutes." 304 N.C. 201, 231, 283 S.E.2d 732, 751 (1981), *cert. denied,* — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). Moreover, in *State v. Taylor,* we also found "no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances." 304 N.C. 249, 285, 283 S.E.2d 761, 783 (1981). It suffices to say that defendant's similar contentions must be overruled pursuant to the binding authority of both *Rook* and *Taylor.*

XIV.

Both the prosecutor and the trial court advised the jury that it had a duty to

recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]

Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudicially withdrew from the jury its final option ... to recommend a life sentence notwithstanding its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

[67, 68] The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously *impose or reject* a sentence of death. Instead, the jury may only exercise guided discretion *in making the underlying findings* required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson*, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); *see State v. Barfield*, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in *Goodman*, explained that:

> [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.

Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17]

XV.

The trial court instructed the jury upon the statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the murders were "especially heinous, atrocious, or cruel." Defendant essentially contends that the evidence did not support the existence of this factor and that the trial court's instruction upon it thus violated the Eighth Amendment.

[69] In accordance with the dictates of the Eighth Amendment, our Court has ad-

16. Similar instructions about the jury's duty to return a certain sentencing verdict, based upon its affirmative findings under G.S. 15A-2000(c), were given in three other death cases previously decided by our Court, in which no corresponding exception or assignment of error was raised on appeal: *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); and *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982).

17. There is no constitutional infirmity in such an instruction. *See, e.g. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (cited in the dissent).

hered to the position that the aggravating circumstance of G.S. 15A-2000(e)(9) "does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim." *State v. Rook*, 304 N.C. 201, 226, 283 S.E.2d 732, 747 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *see Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see, e.g., State v. Hamlette*, 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981) (submission of G.S. 15A-2000(e)(9) was erroneous). Instead, our Court has made it clear that the submission of G.S. 15A-2000(e)(9) is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979); *see, e.g., State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981). It is, therefore, plain that an issue concerning the propriety of the submission of this aggravating factor is resolved according to the peculiar surrounding facts of the capital case under consideration.

[70] Examining the case at bar, we hold that there was sufficient evidence whereby the jury could have reasonably concluded that the murders of Pachaco and Ausley were especially despicable and wanton under G.S. 15A-2000(e)(9). The evidence showed that defendant carefully executed a deliberate and premeditated plan for murder. We have already set out the details of the murders at length in the beginning of the opinion, and it would be repetitious to summarize them again here. It suffices to say that the deaths of the unsuspecting victims were not instantaneous and that both killings involved the infliction of unusual physical or psychological torture. Each victim essentially witnessed (or heard) the shooting of the other and was helpless to prevent this unprovoked horror. The killing of Pachaco was excessively brutal in that defendant, having already shot him once, walked over to where he lay moaning on the floor and shot him again at point blank range. The killing of Ausley was merciless and conscienceless in that defendant shot him as he begged and pleaded for his life. Defendant seemed to enjoy the killings, and he showed no remorse for what he had done at that time. In fact, defendant callously evaluated his conduct in his subsequent announcement to his companions that he had "just blown away two dudes." Viewing the circumstances of the murders as a whole, we hold that the trial court correctly instructed the jury upon G.S. 15A-2000(e)(9).

XVI.

The sentence of death in a given case cannot be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2). Defendant argues that the infliction of the death penalty for these murders would be excessive and disproportionate punishment. We disagree. All things considered, we cannot say, *as a matter of law*, that this defendant is somehow less deserving of capital punishment than the other occupants of death row. *See, e.g., State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The facts of the instant case speak for themselves and we shall not disturb the factual findings made by the jury under G.S. 15A-2000(c) in reaching its recommendations for the death penalty in this case.

[71, 72] Within this argument, defendant also urged this Court to adopt several

procedures to assist appellate review of the proportionality of the death sentence in a particular case. It would serve no useful purpose to address each suggestion here. Instead, we believe that all of the matters raised by defendant are adequately answered by our two-fold determination that: (1) the review mandated by G.S. 15A-2000(d)(2) (*supra*) provides a sufficient constitutional safeguard against the unconstitutional imposition of cruel and unusual punishment, and (2) the intended *ultimate* emphasis of proportionality review under G.S. 15A-2000(d)(2) is upon the independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.

XVII.—XIX.

[73-75] The final three "arguments" presented by defendant's appellate counsel ask us to re-examine the constitutional validity of several prior cases without advancing a single good, logical or compelling reason for doing so. Such spurious disputations lack merit, do not warrant discussion and are not well received. Even so, we shall take this opportunity to reaffirm today the constitutionality of the following aspects of our capital sentencing procedure: (1) the bifurcated trial proceedings of G.S. 15A-2000, in which the same jury determines both the guilt and punishment issues, and the use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to the death penalty; (2) the submission of the sufficiently clear statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the capital felony is "especially heinous, atrocious, or cruel," in appropriate cases; and (3) the placement of the burden upon the defendant of persuading the jury, by a preponderance of the evidence, that a particular mitigating circumstance exists. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980) (and cases cited in part I of the opinion, *supra*); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

XX.

The decision to take a life pursuant to the law, for the life of another, or others, wrongfully taken, is a very grave and solemn matter. Thus, this Court accords the utmost diligence and care in its review of capital cases. In the instant case, we have fully considered all of the arguments in defendant's brief, which encompassed the multitudinous assignments of error and exceptions in the record on appeal. We are convinced that both phases of defendant's trial were competently conducted without the accompaniment of constitutional defect or prejudicial error, and we so hold.

We also hold that the judgments of death were lawfully imposed. The evidence supported submission of the aggravating circumstances listed in G.S. 15A-2000(e)(9) and (11). There is no indication that the jury recommended capital punishment under the influence of passion or prejudice. Finally, the penalties imposed do not seem excessive or disproportionate considering the premeditated and callous manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life. Indeed, the record impels the conclusion that justice has been done in every respect. In sum, we have no authority or cause to disturb the duly entered judgments of death.

NO ERROR.

MITCHELL, J., did not participate in the consideration or decision of this case.

CARLTON, Justice, concurring.

I concur with the majority opinion. However, I wish to add that I agree with the views expressed by Justice Exum in section V. of his dissenting opinion. In my opinion, the comparison pool for proportionality review for first degree murder cases

should include all cases tried under the present death penalty statute which have been affirmed on appeal by this Court, regardless of the punishment imposed. I think it is time for this Court to address this issue.

BRANCH, C. J., joins in this concurring opinion.

EXUM, Justice, dissenting as to sentence.

I.

I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a barebones analysis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury *must* return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, have made it abundantly clear that the majority's interpretation is not constitutionally required.

In one of its first cases construing our death penalty statute, this Court noted, "[t]he first maxim of statutory construction is to ascertain the intent of the legislature. To do this, this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." *State v. Johnson*, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979). In *Johnson*, this Court recognized that our death penalty statute was enacted following a quintet of cases all decided by the United States Supreme Court on 2 July 1976. These cases struck down mandatory death penalty statutes in North Carolina, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), and Louisiana, *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion), but sustained death penalty statutes which, in varying degrees, sought to control the discretion exercised in capital sentencing in Georgia, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion); Florida, *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion); and Texas, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (plurality opinion). This Court noted in *Johnson* that these five cases "made clear that neither unbridled, unguided discretion *nor the absence of all discretion* in the imposition of the death penalty is constitutionally permissible." 298 N.C. at 58, 257 S.E.2d at 607 (emphasis supplied). After further discussion of United States Supreme Court decisions and various provisions of the Model Penal Code, upon which our statute was largely based, this Court concluded in *Johnson*, 298 N.C. at 63, 257 S.E.2d at 610:

In summary, there are a number of controlling factors governing the interpretation of our death penalty statute. Unbridled discretion in the imposition of the sentence is not permitted. On the other hand, sentencing juries must have some discretion to determine in a rational and consistent manner those cases in which the death penalty should be imposed. Juries are to be guided in the process by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused. Thorough jury instructions, which incorporate and reflect the definitions accorded to these criteria and which are fully applied to the facts of each case, must be given. In each case the process must be directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the neces

sity of balancing them against each other in determining whether to impose the death penalty. Lastly, any imposition of the death penalty by the jury should be searchingly reviewed by the appellate courts to insure the absence of unfairness, arbitrariness or caprice in the result.

Regarding the question before us, the statute, G.S. 15A-2000, provides in pertinent part as follows:

> (b) Sentence Recommendation by the Jury.—. . , In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury *that it must consider* any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, *the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters*:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
>
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
>
> (3) *Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.*
>
> . . . .
>
> (c) Findings in Support of Sentence of Death.—*When the jury recommends sentence of death*, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:
>
> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
>
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

[Emphases supplied.]

In essence, then, the statute provides that in determining whether to impose death or life imprisonment the jury "must consider" certain aggravating and mitigating circumstances; that the jury's sentence recommendation shall be "based upon" the sufficiency of the aggravating circumstance(s) and the mitigating circumstance(s) and their relative weights; and that "when the jury recommends a sentence of death," it must sign a writing in which three questions are answered affirmatively and unanimously beyond a reasonable doubt.

From this statutory scheme the legislative intent clearly emerges. The legislature has sought to strike a balance between fairness to the individual defendant and consistency among the cases in which the death penalty is imposed. It has designed a statute which avoids the two extremes of mandatory death penalties or unbridled discretionary action by juries. The legislature intended for the jury to consider: first, the sufficiency of the aggravating circumstance(s); second, whether any mitigating circumstance(s) exist which outweigh the aggravating circumstance(s); and third, based on these considerations whether to recommend a death sentence or life imprisonment. *Only when the jury determines to recommend death* is the jury required to sign a writing which shows its affirmative, unanimous findings that one or more statutory aggravating circumstances exist beyond a reasonable doubt, that they are sufficiently substantial to make the death penalty appropriate and that the mitigating circumstances do not outweigh the aggravating circumstances.[1] Subsection (b)

1. Although the jury is not required by statute to answer these questions unless they recommend death, I believe documentation of the

states in two places that the jury's sentence recommendation is to be *based* on these considerations, not decreed by them. There is nothing in this scheme to suggest a legislative intent *to require* the jury to return a sentence of death even if it should answer the three crucial subsection (c) issues affirmatively, just as there is nothing in the statute which permits a jury to ignore the delineated considerations in its deliberations. To hold, as does the majority, that if affirmative answers in writing to these three issues are prerequisite to a jury's recommendation of death, then death *must* be recommended when the prerequisites are met is, logically, a *non sequitur.*

This logical trap is easily sprung; it caught me in my dissent in *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, — U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982), where I lapsed into the same fallacy now being urged by the majority.[2] In *Rook*, however, both my dissent and the majority opinion were addressing a different question, *i.e.*, whether the jury was required to specify which mitigating factors it found to exist. The question now being addressed was not raised in *Rook*, and any conclusion about it was not necessary to the dissent. With the benefit of briefing, argument and my own research, I am convinced that my initial conclusion on the point here in issue, as I expressed it in *Rook*, was wrong, just as I believe the majority's similar conclusion is wrong. The conclusion is not less a *non sequitur* because I once subscribed to it.

Our trial judges initially properly construed the statute to mean that if the jury answered the three issues affirmatively it could, but was not required to, recommend the death penalty. The first Pattern Jury Instruction promulgated after the statute provided that if the jury answered the crucial issues affirmatively then it "*may* recommend the death penalty." N.C.P.I.Crim. 150.10, p. 5 (June 1977) (emphasis supplied). A subsequent revision of the instruction emphasized this point by providing that the jury "*may*, although [it] need not, recommend that the defendant be sentenced to death." N.C.P.I.Crim. 150.10, p. 4 (Replacement, May 1979). These instructions, or a variation of them, have been followed in a large number of death penalty cases.[3]

jury's findings in every capital sentencing proceeding, whether they recommend death or life, is necessary for this Court's use in conducting its proportionality review required under G.S. 15A-2000(d)(2).

2. In *Rook, supra*, I wrote:

> Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no matter how it regards the mitigating circumstances. In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more aggravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that *the mitigating circumstances are insufficient to outweigh the aggravating circumstances.* The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances."

304 N.C. at 242-43, 283 S.E.2d at 757 (emphasis original) (footnote omitted).

3. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981) (R. at 192, "you may recommend death"); *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (R. at 238, "you may recommend"); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979) (R. at 111, "you may recommend"); *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979) (R. at 333, "Based upon these considerations as instructed by the court, you will advise the court whether the defendant should be sentenced to life imprisonment or death"); *State v. Cherry*, 298 N.C. 86, 277 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (R. at 341, "Based upon these considerations as instructed by the Court, you will advise the Court whether the defendant should be sentenced to life imprisonment or death"); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) (R. at 185, "you may then, recommend the death penalty"); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979) (R. at 276, "you may—but are not compelled to—recommend the death penalty").

Other cases reviewed by this Court have contained instructions which went even further in telling the jury that the death sentence was not mandated by affirmative answers to the crucial issues. For example, in *State v. Oliver*, 302

After our decision in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), the Pattern Jury Instruction for our trial judges was changed so as to provide that if the jury answered the three issues affirmatively, it would be its "duty to recommend that defendant be sentenced to death." N.C.P.I. Crim. 150.10, pp. 3–4 (Replacement, May 1980). The case cited in support of this change in the instruction is *Goodman*.

The issue in *Goodman*, however, was not whether the jury should be told it has a "duty" to recommend the death penalty if it answers the three issues affirmatively and unanimously. The issue in *Goodman* was whether, as the defendant contended, the trial court "should have explained to the jury that it had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances." Brief for Defendant Appellant at 15–16. Defendant argued that "[i]t should be incumbent upon the trial Court to explain in detail that *no* mandatory recommendation of the death penalty is required regardless of findings as to aggravating and mitigating circumstances set forth in the statute." *Id.*

Thus, defendant Goodman was arguing that the trial court should be required to *explain* to the jury that it could, in effect, *ignore* the considerations which by statute it must consider in recommending a life or death sentence. This goes far beyond the permissive instruction actually given and upheld in *Goodman*, *i.e.*, the instruction that if the jury answered the three subsection (c) issues affirmatively and unanimously, it "may then recommend the death penalty." (R. at 185).

The state's brief in *Goodman* recognizes that "the Court left the jury with the understanding that, even should they find more aggravating than mitigating circumstances, they could still recommend life imprisonment.... At no point did the Court state that the jury could not recommend life imprisonment when the aggravating circumstances outweighed the mitigating. What the Court was saying was that (even where such aggravating circumstances appeared to be more substantial than mitigating circumstances) the jury could still recommend life imprisonment." Brief for the state at 19–20.

The Court in *Goodman* answered the defendant's argument as follows, 298 N.C. at 34–35, 257 S.E.2d at 590:

> His argument is that without such instruction the jury will mathematically balance the two types of factors against each other and will impose the death penalty whenever aggravating circumstances outnumber mitigating ones. We do not agree that this is the manner in which a jury will reach its decision on this important question or that the instruction for which defendant contends is required by our statute.
>
> It must be emphasized that the deliberative process of the jury envisioned by G.S. 15A–2000 is not a mere counting process. *State v. Dixon, supra* [283 So.2d 1, Fla.]; *State v. Stewart, supra* [197 Neb. 497, 250 N.W.2d 849]. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. *Nuances of character and cir-*

N.C. 28, 274 S.E.2d 183 (1981) (R. at 668), the jury was told:

> Unless you have answered Issues One, Two, Four "yes" you must recommend that a defendant in a given case be sentenced to life. Only if you have answered Issues One, Two and Four "yes" may you recommend that a defendant be sentenced to death. Even then, though, you are not required to do so. You still may recommend life imprisonment. However, if you answered Issues One, Two and Four "yes" you are, on further deliberations, satisfied beyond a reasonable doubt that the only just punishment for this defendant is—a given defendant in a given case, is the death penalty, then you may so recommend it; realizing, of course, the tremendous responsibility which rests on your shoulders when you make that recommendation.

See, also, State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) (R. at 231, "you would then further deliberate upon your sentence recommendation"); *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980) (R. at 618, "Even though you are not required to do so, you may still recommend life in prison").

cumstance cannot be weighed in a precise mathematical formula.

At the same time, we believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and *impose the sanction of death* at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it. For these reasons defendant's seventh assignment of error is overruled.

[Emphasis supplied.]

The majority's conclusion on this point in the instant case as well as the change in the Pattern Jury Instruction are based on a misreading of *Goodman*. *Goodman* simply recognized that, under the instructions as given, there would be no cause for the jury "mathematically" to balance the aggravating against the mitigating and "impose the death penalty whenever aggravating circumstances outnumber mitigating ones." *Goodman* cautioned that juries should not be instructed in a manner which would cause them to "impose the sanction of death at their own whim." *Goodman* does not support the proposition that a jury has a duty to impose the death penalty whenever it concludes that the statutory aggravating circumstances are sufficiently substantial to call for it and that the mitigating circumstances are insufficient to outweigh the aggravating. *Goodman* recognizes that given such determinations, a jury may yet opt for life imprisonment and notes that there is no way to escape some subjectivity in deciding who shall live and who shall die. Juries are called on in this kind of decision, we said in *Goodman*, to consider "[n]uances of character and circumstance [which] cannot be weighed in a precise mathematical formula."

It is for this reason that a jury ought not be required to return the death penalty simply because it answers the crucial subsection (c) issues affirmatively. Conscientious juries may determine that these issues ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.[4] We should not construe our statute to require such a jury, nevertheless, to impose it.

Our statute is designed simply to insure that certain specific (subsection (c)) prerequisites are met before the death penalty is imposed. Its only prerequisites for the imposition of life imprisonment are that the jury base such a decision (subsection (b)) on a weighing against each other of various aggravating and mitigating circumstances which it may find to exist. Although the jury may not recommend death without specifically, and in writing, answering subsection (c) issues affirmatively, even if it does so it may yet recommend life.

The United States Supreme Court has made it quite clear that these kinds of death penalty or life imprisonment decisions do not result in the unbridled discretionary determinations found wanting in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam). In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court had

4. Indeed, juries have answered the crucial subsection (c) issues affirmatively and yet either recommended life imprisonment, *State v. King*, 301 N.C. 186, 270 S.E.2d 98 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); or were unable unanimously to agree on a sentence, thus requiring the judge to impose a life sentence pursuant to G.S. 15A-2000(b). *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), on resentencing in Columbus Superior Court (Case No. 79CRS1943); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

At least one jury has found ambiguity in the "Issues and Recommendation as to Punishment" form generally submitted to juries deliberating on sentences in capital cases. *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1981) (copy found in Case No. 80CRS5530, Onslow Superior Court).

before it a Missouri death penalty statute very similar to ours. In *Bullington*, the Supreme Court noted that a Missouri jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances." 451 U.S. at 434-35, 101 S.Ct. at 1855-56. Although the question was not raised, there is no suggestion in *Bullington* that such a statute would be constitutionally infirm.

In *Gregg v. Georgia, supra*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, the Supreme Court considered a Georgia death penalty statute which provided that the jury could return a sentence of death only if it found the existence of one of ten statutorily specified aggravating circumstances. The jury was not required to return a death sentence even if it found the existence of one or more of the ten statutorily specified aggravating circumstances and was "not required to find any mitigating circumstance in order to make a recommendation of mercy." *Id.* at 197, 96 S.Ct. at 2936. On appeal of his death sentence, defendant argued that because a Georgia jury had "the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present," the statute violated the *Furman* prohibition against unbridled discretion. *Id.* 428 U.S. at 203, 96 S.Ct. at 2939. The United States Supreme Court answered by saying:

> This contention misinterprets *Furman* .... Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, *the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.*

428 U.S. at 203, 96 S.Ct. at 2939 (emphasis supplied). In answering defendant's contention that there were other discretionary decisions which could be made in the processing of a murder case which would result in some candidates for the death penalty actually escaping it, the Supreme Court said:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199, 96 S.Ct. at 2937. Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, said in a concurring opinion in *Gregg*:

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on *the basis of factors too intangible to write into a statute*, and I cannot accept the naked assertion that the effort is bound to fail.

428 U.S. at 222, 96 S.Ct. at 2947 (emphasis supplied).

Finally, in *Jurek v. Texas, supra*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, the Supreme Court considered a Texas statute which required the jury to impose the death sentence if it answered three questions affirmatively.[5] The attack made on the Tex-

5. The questions are these:
(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the de-

as statute was that it created a mandatory death penalty in violation of the principles laid down in *Woodson v. North Carolina, supra*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, and *Roberts v. Louisiana, supra*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974. The Supreme Court struggled with this question because the Texas statute appeared to have no provision for the jury to consider mitigating circumstances. "Thus," the Court said, "the constitutionality of the Texas procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. at 272, 96 S.Ct. at 2956. The Court concluded that the jury's consideration of mitigating circumstances, under the interpretation given the second question by the Texas Court of Criminal Appeals, was encompassed in its decision on that question. *See supra* note 5. Therefore, the Court concluded that the statute was not subject to the "mandatory death sentence" attack.

Apparently under the rationale of *Jurek*, the majority's interpretation of our statute would pass constitutional muster. But I am satisfied that the interpretation for which I argue is more solidly supported in the decisions of the United States Supreme Court; whereas the majority's view, which could be supported only by *Jurek*, is at least constitutionally suspect.

Assuming that we are free under the United States Constitution to opt for either interpretation, we should adopt the one which most nearly comports with the legislature's intent as that intent is revealed in the plain words of the statute. The legislature has developed a statutory scheme designed to accommodate the twin "goals of measured, consistent application and fairness to the accused." *Eddings v. Oklahoma*, — U.S. —, —, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, 8 (1982). In *Goodman, supra*, 298 N.C. 1, 257 S.E.2d 569, we held that instructions which, in effect, explained to the jury that it could ignore the procedure devised by the legislature were not authorized by our statute and would be contrary to the *Furman* standards. Likewise, instructions that tell the jury they must impose the death penalty if they answer certain questions affirmatively and unanimously are not authorized by our statute and fail to give appropriate weight to inarticulable, intangible "[n]uances of character and circumstances." *State v. Goodman, supra*, 298 N.C. at 34, 257 S.E.2d at 590.

Our statute, like the Supreme Court said of its decision in *Lockett*,[6] "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma, supra*, — U.S. at —, 102 S.Ct. at 874, 71 L.Ed.2d at 8. Both the instructions disapproved in *Goodman* and those given in the instant case upset the statute's finely tuned balance between consistency and sensibility to the uniqueness of an individual. The instruction sought by the defendant in *Goodman* tilts too much in favor of individualized consideration at the expense of consistency; whereas the instruction given here tilts too much in favor of consistency at the expense of individualized consideration.

The instruction most in keeping with the legislative design and which ought to be given in all cases is that recommended by the Superior Court Judges' Pattern Jury Instruction Committee in May 1979. In that instruction jury members are told that if they answer the crucial issues affirmatively and unanimously, "you may, although you need not, recommend that the defendant be sentenced to death." N.C.P.I.Crim. 150.10 at 4.

II.

At least two jurors were excluded for cause in the instant case in violation of the

ceased was unreasonable in response to the provocation, if any, by the deceased.

See 428 U.S. at 269, 96 S.Ct. at 2955 (quoting Tex.Code Crim.Proc., art. 37.071(b) (Supp. 1975-76)).

6. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

limitations imposed by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), an opinion by Mr. Justice Stewart. Some particularly pertinent language of this landmark case bears repeating, 391 U.S. at 519-23, 88 S.Ct. at 1775-77:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.... [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.... [A] jury composed exclusively of ... people [who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for [those who believe in the death penalty].
>
> If the State had *excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death*, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> ....
>
> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.
>
> ....
>
> To execute [such a] death sentence would deprive him of his life without due process of law. [Footnotes omitted.] [Emphasis supplied.]

Furthermore, *id.* at 522-23 n. 21, 88 S.Ct. at 1771 n. 21,

> a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out....
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. [Emphasis original.]

The test applicable to this case then, under *Witherspoon*, for excusal for cause on death penalty opposition grounds is that the prospective juror must make it "unmistakably clear" that he or she would "automatically" vote against the death penalty "without regard to any evidence that might be developed at the trial of the case." A juror who has scruples, or reservations, or who is even opposed to capital punishment, but who is not "irrevocably committed, before

the trial has begun, to vote against [it] regardless of the facts and circumstances" that might be brought out at trial, may not be excused for cause. Neither may a juror who states merely that he or she has " 'a fixed opinion against' capital punishment" or that he or she does not " 'believe in' capital punishment" be excused for cause, because such juror may yet "be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Boulden v. Holman*, 394 U.S. 478, 483–84, 89 S.Ct. 1138, 1141–42, 22 L.Ed.2d 433 (1969). Jurors may be excused for cause, however, if their opposition to the death penalty is so strong that they cannot take an oath to "follow the law" in trying the case. *Lockett v. Ohio*, 438 U.S. 586, 595–96, 98 S.Ct. 2954, 2959–60, 57 L.Ed.2d 973 (1978) (plurality opinion).

The United States Supreme Court's latest decision applying *Witherspoon* is *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In *Adams* the Court made it clear that *Witherspoon* must be followed even under post-*Furman* guided discretion capital sentencing procedures. *Adams* held that because of *Witherspoon* limitations jurors may not be excused for cause on the ground that their opposition to the death penalty might "affect" their deliberations on issues of fact which might arise in the case.[7] The Court said, 448 U.S. at 46–47:

> [A] Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion,' 577 S.W.2d, [717] at 730, permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*.

It said, further, 448 U.S. at 49–50, 100 S.Ct. at 2528–29, that jurors were improperly excluded

> who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be 'affected.' But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

If only one juror is excused for cause, in violation of *Witherspoon* limitations, a sentence of death cannot stand. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) (per curiam). The *Davis* Court noted, 429 U.S. at 123, 97 S.Ct. at 399:

> Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' 391 U.S. at 522 n. 21 [88 S.Ct. at 1777 n. 21], he cannot be excluded; if a venire-

7. *See supra* note 5 and accompanying text.

man is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

This Court held in *State v. Bernard*, 288 N.C. 321, 325, 218 S.E.2d 327, 330 (1975), that a juror could not be excused merely because "he *thought* he would automatically vote against the imposition of the death penalty regardless of the evidence." (Emphasis original.)

Finally, the meaning of the voir dire colloquy is that which would be given it by the prospective juror rather than one trained in the law. "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon v. Illinois, supra*, 391 U.S. at 515–16 n. 9, 88 S.Ct. at 1773 n. 9 (quoted with approval in *Boulden v. Holman, supra*, 394 U.S. at 481–82, 89 S.Ct. at 1140).

Turning now to the challenges for cause here under attack, I am satisfied that prospective juror Mary Neal was excused for cause on broader grounds than *Witherspoon* permits. Neal, after an extended colloquy with the prosecutor, never expressed any categorical opposition to the death penalty. She simply said that she would have to be absolutely certain of a defendant's guilt before she could vote to impose it. That portion of the colloquy which accurately reflects her attitude is the following:

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

. . . . .

Q. Let me ask that question a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence?

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be—I would have to absolute know for sure, I mean no doubt whatsoever.

. . . . .

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty—if I went along with the guilty part, if I decided they were guilty—no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you, but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

At most, Neal's attitude toward the death penalty "affected" her deliberations on the guilt phase of the case in the sense that she would have to be absolutely certain of defendant's guilt. "[P]rospects of the death penalty may affect what [a juror's] honest judgment of the facts will be or what [a juror] may deem to be a reasonable doubt," *Adams v. Texas, supra*, 448 U.S. at 50, 100 S.Ct. at 2529, without the juror's subjection on that ground to a challenge for cause. Neal never "unmistakably" said that she would not impose the death penalty, or that she would "automatically" vote for life imprisonment, regardless of what the evidence might show. She said she didn't "believe" and didn't "think" she could vote for death. She never said, absolutely, that she could or would not. She should not have been excused for cause.

Prospective juror Frank Rogers said, "I don't go for [the death penalty] too much" and "I don't think much of the death penalty." He never said he was categorically opposed to the death penalty. When asked whether he could consider imposing the death penalty, the following occurred:

> A. I can consider, but as I say—
>
> Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?
>
> MR. HARRISON: Objection.
>
> A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.

At that point, the court intervened as follows:

> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?
>
> MR. ROGERS: That is true.

Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence *that may be introduced at the trial.* He said he could not impose it under any circumstances "without hearing any evidence." Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, or to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Rogers's position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one way or the other without hearing some evidence. Rogers should not have been excused for cause.

III.

The majority concludes that the trial court did not err in refusing to submit both in his instructions and on the written [illegible] defendant's "relatively low mentality" as a mitigating circumstance because there was no evidence to support it and, even if there had been supporting evidence, the error could not have been prejudicial. As the majority correctly notes, a defendant's low mentality, if it exists, is "properly considered in mitigation of a capital felony."

I cannot agree with the majority that the evidence does not support defendant's "relatively low mentality" mitigating circumstance. Defendant's psychiatric witness, Dr. Billy Royal, testified that defendant scored .66 on an intelligence test; but, he said, "[w]e felt that his other tests indicated that his I.Q. was probably a little higher than that and fell at least into the low-normal range of intelligence." Apparently the majority concludes that any intelligence quotient which is within a "normal range" cannot be considered by a jury in a capital case unless it is proffered by the defendant

as an absolute score on an intelligence test. The majority concludes that if it is proffered under the label "relatively low mentality," rather than as a raw score, it may not be considered.

I simply cannot subscribe to, nor do I really understand, the distinction drawn by the majority. Any kind of absolute score on an intelligence test, in order to be meaningful to a lay jury or for that matter to lawyers and judges, needs explanation by competent expert testimony. The testimony in this case was that defendant's intelligence was in the "low-normal range." Defendant asked that his "*relatively* low mentality" be submitted as a mitigating circumstance. The evidence supports that he did have a "*relatively* low mentality." It should be for the jury to assess this quality in terms of its mitigating effect. It is not for the court to say that the jury could not, as a matter of law, consider a person's "relatively low mentality" as a mitigating circumstance because the mentality is within the outer limits of "normal." To me, the phrase "relatively low mentality" accords precisely with the evidence which was introduced. A person whose intelligence is in the low-normal range must perforce have a relatively low mentality. Contrary to the majority's conclusion, the terms are synonymous.

Neither on this record am I able to say that not permitting the jury to consider this mitigating circumstance was harmless beyond a reasonable doubt. Not to permit a jury to consider any relevant mitigating circumstance is an error of constitutional dimension. *Eddings v. Oklahoma, supra,* — U.S. —, 102 S.Ct. 869, 71 L.Ed.2d 1; *Lockett v. Ohio, supra,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973. Before we can deem such an error harmless, we must be satisfied "that it was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); G.S. 15A-1443(b). The burden is upon the state to so demonstrate. *Id.*

Of the ten mitigating circumstances submitted, we know from the record only that the jury found "one or more." We do not know how many beyond one it found. It is possible that the jury found only one mitigating circumstance to exist out of the list of ten. If it did, the failure to submit an additional mitigating circumstance which should have been submitted and which the jury could have found to exist might well have made a difference in the jury's ultimate recommendation. At least I cannot say beyond a reasonable doubt that it would not have made a difference.

The United States Supreme Court has recently recognized that a youthful defendant's mental development is a significant mitigating circumstance. *Eddings v. Oklahoma, supra,* was a capital case in which, under Oklahoma procedure, the sentencing decision was made by the trial judge. The judge, after hearing evidence, found all of three alleged aggravating circumstances to exist beyond a reasonable doubt. He also found that the youth of the defendant (age sixteen) was a mitigating circumstance "of great weight." The trial judge, however, did not believe he could consider "*the fact of this young man's violent background.*" *Id.* at —, 102 S.Ct. at 873, 71 L.Ed.2d at 7 (emphasis original). For failure of the trial judge to consider this additional mitigating circumstance, the United States Supreme Court set aside the death penalty and remanded for further proceedings. The Court said, *id.* at —, 102 S.Ct. at 877, 71 L.Ed.2d at 12:

> [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background *and mental* and emotional *development* of a youthful defendant be duly considered in sentencing. [Emphasis supplied.]

In the case at bar the trial judge's refusal to submit and instruct on defendant's "relatively low mentality" as a mitigating circumstance deprived the defendant of his right to have the jury consider his "mental . . . development." The error was not cured by submitting to the jury the catchall language of the tenth mitigating circumstance when it was unaccompanied by any specific instruction relating to the particu-

lar circumstance of defendant's low mentality.

For the foregoing reasons, I vote to vacate the death sentence imposed in this case and to remand for a new sentencing hearing. I concur in the majority's conclusion that there was no prejudicial error in the guilt phase of the case.

V.

This is yet another in a growing number of cases in which a majority of the Court has affirmed the death penalty and in conducting its statutorily mandated "proportionality review" of the death sentence has failed to advise the bar of the manner in which it conducts such a review. The majority, unlike courts in other jurisdictions which have statutes similar to ours, has yet to tell the bar whether its review is based on comparisons with those cases in which the death sentence was imposed at trial and affirmed on appeal, or with those cases in which the jury could have recommended the death penalty but instead recommended life imprisonment and which have been reviewed on appeal, or with cases from some other kind of pool. It is time for the majority to declare itself on this important question, and I urge it to use as a pool for comparison purposes all cases tried under the new death penalty statute, whether the jury recommended death or life imprisonment and which have been reviewed on appeal by this Court.

The statute, G.S. 15-2000(d)(2), requires us to impose a life sentence if we find that a death sentence imposed by the trial court "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This language is identical to language in Georgia's death penalty statute. *See* Ga.Code Annot. § 27-2537(c)(3) (1978). The Georgia Supreme Court looks to all appealed murder cases, whatever the sentence imposed, in making its comparisons. *Ross v. State*, 233 Ga. 361, 365-66, 211 S.E.2d 356, 359 (1974), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1217 (1976).[8] In sustaining the Georgia death penalty statute, the United States Supreme Court relied on the Georgia Supreme Court's proportionality review safeguard. Of it, the United States Supreme Court said in *Gregg v. Georgia, supra*, 428 U.S. at 206, 96 S.Ct. at 2940:

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. *If a time comes when juries generally do not impose the death sentence in a certain kind of murder case*, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. [Emphasis supplied.]

The Florida Supreme Court in conducting its proportionality review also compares all appealed murder cases, including those where a sentence less than death was imposed. It has concluded that ignoring life sentences imposed in factually similar cases would make its review procedure constitutionally defective. *McCaskill v. State*, 344 So.2d 1276 (Fla.1977) (per curiam).

The plain words of our statute require that we compare the case before us not only with similar cases in which the death penalty has been imposed but with similar cases in which the jury was permitted to consider it but decided instead to recommend life imprisonment. The basic purpose of proportionality review is to make sure that the death sentence in the case before us is not "excessive" to sentences "imposed in similar cases." If we look for comparison only to cases in which the death penalty has been imposed, the sentence in the case under review could never be excessive because one death sentence never "exceeds" another. It is only by comparing the case being reviewed in which a death sentence was imposed with other similar cases in which life was imposed that we can determine wheth

8. The Georgia Supreme Court also noted "that nothing in the statute forecloses this court during the course of its independent review from examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." *Ross v. State, supra*, 233 Ga. at 366, 211 S.E.2d at 359.

er the death penalty in the case being reviewed is really excessive to the penalty being imposed in similar cases. For, to reiterate what the Supreme Court said in *Gregg v. Georgia, supra,* if there are certain kinds of murder cases in which our juries are generally not recommending death, then an occasional death sentence imposed in those kinds of cases ought to be set aside by this Court.[9]

We ought not limit ourselves only to cases where the death sentence was imposed and affirmed. To do so means that we only ask whether the case under review is as bad as the other death cases. The legislature intended us not only to make that determination but also to determine whether the case under review is more deserving of the death penalty than similar cases in which life sentences have been imposed. The statute's plain language requires that we make both kinds of comparisons. Of the two, the latter is the more meaningful and is probably constitutionally required.

Further, by using only other death sentence cases affirmed on appeal, the Court severely limits the pool of cases available for comparison. Since the effective date of our capital punishment statute, 7 June 1977, there have been only six such cases. *See State v. Taylor,* 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook, supra,* 304 N.C. 201, 283 S.E.2d 732; *State v. Hutchins, supra,* 303 N.C. 321, 279 S.E.2d 788; *State v. Martin,* 303 N.C. 246, 278 S.E.2d 214, *cert. denied,* — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell,* 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied,* 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield,* 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied,* 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The statute requires that we compare factually "similar" cases. Similar cases for comparison purposes are simply not present in such a small sampling. The Court should want to expand, rather than restrict, the pool of cases so that truly similar cases will be more quickly available and we can begin to make the comparisons which the statute requires.

The bar is entitled to know upon what basis we are conducting the proportionality review mandated by the statute. Defendant Pinch has expressly and reasonably requested that we provide this knowledge. We should grant the request. We should not continue to keep the manner in which we perform this duty shrouded in mystery.

STATE of North Carolina

v.

Larry Darnell WILLIAMS.

No. 70A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Gaston County, Frank W. Snepp, Jr., J., of first-degree murder under the felony-murder rule and was sentenced to death. The defendant appealed. The Supreme Court, Meyer, J., held that: (1) record clearly supported jury's guilty verdict and its finding of the aggravated circumstance upon which sentencing court based its sentence of death, and (2) sentence of death was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant.

9. In my dissenting opinion in *State v. Rook, supra,* 304 N.C. at 245–46, 283 S.E.2d at 758–59, I pointed out that rarely do juries in this state impose the death penalty in cases where a defendant was found to have been under the influence of a mental or emotional disturbance or whose capacity to appreciate the criminality of his conduct or to conform his conduct to law was impaired. I suggested that this Court should be slow to affirm death penalties in which either of these mitigating circumstances was found to exist because the penalty might well be excessive to the penalty imposed generally by juries in these kinds of cases.